Supreme Court, U.S.
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No. 00-455

In The

Supreme Court of the United States

WILLIAM M. ACKER, JR. and U. W. CLEMON,

Petitioners,

v.

JEFFERSON COUNTY, ALABAMA,
A political subdivision of the
State of Alabama,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did Jefferson County, Alabama, violate Article III, Section 1 of the Constitution of the United States by imposing a new tax on the salaries of sitting Article III judges, or, in other words does *Evans v. Gore*, 253 U.S. 245 (1920), correctly express the meaning of the Compensation Clause?

2. Do Article III judges who took office before a county income taxing ordinance was adopted, but after the enactment of the state statute that purported to enable the county to adopt such an ordinance, lose the protection of the Compensation Clause because they should have anticipated the possibility that the county might someday tax them?

3. If Article III permits a county to impose a new income tax on a sitting Article III judge, must the tax, in order to be effective in its application to such a judge, be generally applicable to all taxpayers?

PARTIES TO THE PROCEEDINGS

Petitioners, William M. Acker, Jr. and U. W. Clemon, were named as defendants in separate tax collection suits originally filed by respondent, Jefferson County, Alabama, in an Alabama state court. The cases were removed to the United States District Court for the Northern District of Alabama, where summary judgment was granted in favor of Acker and Clemon. Jefferson County appealed to the Court of Appeals for the Eleventh Circuit, where the cases were considered together. The convoluted history of the cases will be developed at a more appropriate place in this petition.

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PETITION FOR WRIT OF CERTIORARI

William M. Acker, Jr. and U. W. Clemon respectfully petition this Honorable Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit reported as *Jefferson County, Ala. v. Acker*, 210 F.3d 1317 (11th Cir. 2000) and set forth in the attached Appendix hereto as App. 1-12.

OPINIONS BELOW

The United States District Court for the Northern District of Alabama granted summary judgment in favor of Acker and Clemon, who were defendants in that court. *Jefferson County, Ala. v. Acker*, 850 F. Supp. 1536 (N.D. Ala. 1994); App. 27-62. On appeal by Jefferson County, a panel of the Court of Appeals for the Eleventh Circuit reversed. *Jefferson County, Ala. v. Acker*, 61 F.3d 848 (11th Cir. 1995). Granting *en banc* rehearing the *en banc* Eleventh Circuit affirmed the District Court. *Jefferson County, Ala. v. Acker*, 92 F.3d 1561 (11th Cir. 1996). On Jefferson County's petition for certiorari, this Court vacated the Eleventh Circuit judgment and remanded to the *en banc* court. *Jefferson County, Ala. v. Acker*, 520 U.S. 126 (1997). The Eleventh Circuit, again sitting *en banc*, affirmed the District Court. *Jefferson County, Ala. v. Acker*, 137 F.3d 1314 (11th Cir. 1998). After granting another petition for certiorari filed by Jefferson County, this Court reversed the Eleventh Circuit and again remanded the case to the *en banc* court from whence it came. *Jefferson County, Ala. v. Acker*, 527 U.S. 423 (1999). A panel of the Eleventh Circuit then reversed the District Court. *Jefferson County, Ala. v. Acker*,

210 F.3d 1317 (11th Cir. 2000). The Eleventh Circuit denied *en banc* rehearing. App. 13.

JURISDICTION

Petitioners' application for rehearing and suggestion for rehearing *en banc* was denied by the Eleventh Circuit on June 27, 2000. App. 13. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The relevant constitutional provision involved is the Anti-Diminution Clause of Article III, Section 1 of the United States Constitution which states:

> The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services a Compensation which shall not be diminished during their Continuance in Office.

App. 15.

STATEMENT OF THE CASE

Petitioners do not know what this Court will do in response to the pending petition for a writ of certiorari filed by the United States in *United States v. Hatter*, No. 99-1978. Neither do petitioners know what this Court would do on the merits in the event it undertakes to

review what the Court of Appeals for the Federal Circuit did in *Hatter v. United States*, 64 F.3d 647 (Fed. Cir. 1995), and in particular, what this Court now thinks about the continued viability of *Evans v. Gore*, 253 U.S. 245 (1920). Petitioners do know what the Federal Circuit thinks about *Evans v. Gore*. It said so in *Hatter*. Petitioners also know that what the Federal Circuit said about *Evans v. Gore* cannot be reconciled with what the Eleventh Circuit, in the case which is the subject of this petition, said about *Evans v. Gore*.

The course of the proceedings and the dispositions were well stated in the Eleventh Circuit's opinion at *Jefferson County, Ala. v. Acker*, 210 F.3d 1317, and in the prior opinions of the various other courts, including this Court, to which the Eleventh Circuit's opinion referred. Nevertheless, a brief recapitulation and narrowing of the focus for the purposes of this petition is appropriate.

In 1988, Acker and Clemon were sitting Article III judges when Jefferson County adopted Ordinance No. 1120, which purported to impose an occupational license or income tax on every person who was employed in Jefferson County and who did not already have a State license. Acker and Clemon were not required to have a State license to be federal judges. Thus, if they were exempt from the tax, it was not by the terms of the ordinance. The so-called "enabling act" that purportedly authorized Jefferson County to adopt such an ordinance had been passed by the Alabama Legislature over 20 years earlier. That statute lay dormant for 20 years. Arguably, this authorizing statute was not used sooner by Jefferson County because of doubts about its constitutionality.

After Acker and Clemon were sued by Jefferson County in the State court for license taxes which, on constitutional grounds, they declined to pay, Acker and Clemon removed their cases to the United States District Court for the Northern District of Alabama, challenging the tax as applied to them. They claimed, first, that the license violated the Inter-Governmental Tax Immunity doctrine, and, second, that it violated the Anti-Diminution Provision of Article III of the Constitution, also known as the Compensation Clause. The District Court agreed with them on both counts. Jefferson County appealed to the Eleventh Circuit. After a divided panel agreed with Jefferson County, Acker and Clemon were granted an *en banc* rehearing. The *en banc* Eleventh Circuit thereupon vacated the panel opinion, affirmed the District Court and found that Acker and Clemon were protected from this particular ordinance by Inter-Governmental Tax Immunity. The Compensation Clause issue was not discussed. Jefferson County then petitioned for certiorari to this Court. This Court, expressing doubts about the removal jurisdiction of the District Court and about the possible application of the Tax Injunction Act, vacated the *en banc* opinion and remanded the case for reconsideration by the *en banc* Eleventh Circuit. The Eleventh Circuit, sitting *en banc*, complied with the mandate of this Court and reconsidered the questions of jurisdiction and the effect of the Tax Injunction Act. The *en banc* Eleventh Circuit concluded, again, that the removal from the state court had been proper and that the challenge to the tax in federal court by Acker and Clemon was not barred by the Tax Injunction Act. The *en banc* Eleventh Circuit then reaffirmed its conclusion that Jefferson

County's occupational tax violated the Article III judges' immunity from a tax which unduly interfered with the exercise of their judicial duties. Again, because only one reason was needed for declaring the ordinance void, the *en banc* court did not address the Compensation Clause issue.

Jefferson County again petitioned for certiorari. This Court granted the writ. By a 5-4 majority, this Court agreed with the *en banc* Eleventh Circuit that the initial removal of the case had been proper, and that the District Court had properly heard the case. Then, by a 7-2 majority, this Court, on the merits, held that the Public Salary Tax Act accomplished a waiver of any Inter-Governmental Tax Immunity that might otherwise have been enjoyed by Acker and Clemon. This Court held that Jefferson County's ordinance was an income tax and not a license. Because the Compensation Clause issue was not before this Court, this Court did not address that issue, and remanded the case to the court from which the review was taken, namely, the *en banc* Eleventh Circuit.

For some unarticulated reason, the Eleventh Circuit did not sit *en banc* on remand as it had done when this Court remanded the case earlier to the *en banc* court. Instead, on April 26, 2000, a panel of the Eleventh Circuit suggested that "it is time to recognize that *Evans* [*Evans v. Gore*, 253 U.S. 245 (1920)] is dead and gone." App. 6. Accordingly, the panel looked for a way around the express holding of *Evans v. Gore* that the compensation of a sitting Article III judge cannot be diminished by a subsequently enacted tax. In effect ignoring *Evans*, the panel expressly disagreed with the Federal Circuit in

Hatter v. United States, 64 F.3d 647 (Fed. Cir. 1995), which had expressly relied on *Evans v. Gore*, and which is the only other court of appeals that has spoken in recent years on the state of *Evans v. Gore's* health. App. 12.

The Eleventh Circuit panel then held, alternatively, that even if *Evans v. Gore* still has life left in it, it does not help Acker and Clemon, because before they were appointed they had been warned by the preexistence of the enabling act of the mere possibility that Jefferson County might some day adopt such an ordinance, that Acker and Clemon "should have seen it coming" when they accepted their appointments as federal judges. App. 10-12.

The panel made no mention of the important fact that Jefferson County's ordinance totally exempts from the tax a host of occupations, and, therefore, is not a tax on Jefferson County's taxpayers generally. Neither did the panel consider the constitutionality of the so-called enabling act.

The sequence of events was deemed especially important by the Eleventh Circuit. The panel found that the fact that the Alabama Legislature in 1967 had purportedly authorized Jefferson County to impose a tax on the income earned by persons from work performed in Jefferson County is sufficient to get around the anti-diminution provision of Article III in application to Article III judges appointed after 1967, or, in other words that *Evans v. Gore*, if still viable, does not apply in this case. It is undisputed that after 1967, but before Ordinance No. 1120 was enacted, Acker and Clemon became Article III judges. At

all relevant times, the judges' primary offices and courtrooms have been located in Jefferson County, although they both had Article III responsibilities in all 31 Alabama counties that make up the Northern District of Alabama. As pointed out in the appendix to Justice Breyer's dissent in *Jefferson County v. Acker*, 527 U.S. 423, (1999), the subject ordinance totally exempts a three page list of occupations, meaning that the tax burden placed by Ordinance No. 1120 is distributed very unevenly.

REASONS FOR GRANTING THE PETITION

If this Court should deny the pending petition filed in *United States v. Hatter*, No. 99-1978, and should not grant this petition, the existing irreconcilable conflict between the Federal Circuit and the Eleventh Circuit will continue to exist. If this Court does grant certiorari in *Hatter* and affirms the Federal Circuit, but does not grant certiorari in the instant case, it will be too late for these two Article III judges to obtain the constitutional protection to which they should have been entitled. This confluence of events creates a situation in which there is every reason for this Court to look simultaneously at what the Eleventh Circuit did while looking at what the Federal Circuit did. The Federal Circuit categorically held that *Evans v. Gore* still constitutes binding precedent, whereas the Eleventh Circuit has treated *Evans v. Gore* as if it has been sapped of its vitality. A singular opportunity to straighten out this confusion, while updating this Court's Compensation Clause jurisprudence, is here presented to the Court.

In his petition in *Hatter*, the Solicitor General cites the Eleventh Circuit's opinion in the instant case as proof that the Federal Circuit made a mistake.[1] Using this conflict, the Solicitor General argues:

> This Court should grant review to resolve definitively a matter of considerable importance touching on the relations between the Legislative and Judicial Branches. This Court's review is particularly important because the court of appeals believed that it had no authority to depart from this Court's decision in *Evans v. Gore*. Thus, absent review by this Court, *Evans v. Gore* will become fixed as the law of the land on the permissibility of taxation of federal judges' salaries, . . . [2]

Interestingly, the first "head-note" by West's Federal Reporter in its publication of *Jefferson County v. Acker*, 210 F.3d 1317, is the following proposition:

> Where Supreme Court decision that has not been overruled is squarely on point and therefore directly controls case at hand, court of

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[1] Footnote 12 of the petition in *Hatter*, is as follows:

A related issue, which has arisen in the Eleventh Circuit, concerns whether the Compensation Clause bars the application of a county occupation tax to the salaries of federal judges who were appointed before the tax was enacted (but after state law authorized the county to impose such a tax). The Eleventh Circuit recently held that tax valid. *Jefferson County v. Acker*, 210 F.3d 1317, 1321-1322 (2000). The Eleventh Circuit noted that it was "unpersuaded" by the reasoning of the Federal Circuit in this case. *Id.* at 1321 n.5.

[2] Footnote 2 of the Solicitor General's brief in *Hatter*, pp. 15, 16.

> appeals must follow it even though convinced that Supreme Court will overturn that decision next time it addresses issue.

This is an accurate reflection of what the Eleventh Circuit said at first, and it is certainly a correct statement of the law. The Eleventh Circuit panel followed this proposition by accurately reflecting the holding of *Evans v. Gore* as follows:

> The Supreme Court held in *Evans v. Gore*, 253 U.S. 245, 264, 40 S.Ct. 550, 557 (1920), that an income tax on the compensation of Article III judges was unconstitutional, but the holding of that decision is limited to the application of an income tax to judges appointed before the tax was enacted . . .

Acker and Clemon were, of course, appointed before this tax was enacted. Lamenting the possibility that *Evans v. Gore* is hanging by its fingernails, the Eleventh Circuit did its best not to apply *it*. It said:

> Given the severity of the blows *O'Malley* and *Will* inflicted upon *Evans* one might suggest it is time to recognize that *Evans* is dead and gone. *Cf. White v. Lemacks*, 183 F.3d 1253, 1259 (11th Cir. 1999) ("Enough is enough. Like a favorite uncle who has passed away in the parlor, [our decision in] *Cornelius [v. Town of Highland Lake, Ala.*, 880 F.2d 348 (11th Cir. 1989)] needs to be interred. We do so now. Recognizing that it was dealt a fatal blow by [the Supreme Court's decision in] *Collins [v. City of Harker Heights, Texas*, 503 U.S. 115, 112 S.Ct. 1061, 117 L.Ed.2d 261 (1992)], we pronounce *Cornelius dead and buried.")*

Jefferson County, Ala. v. Acker, 210 F.3d at 1320.

While the panel was disclaiming any intent to ignore a never-repudiated decision of this Court, it found "unpersuasive" the only decision by a sister circuit that relies entirely on *Evans v. Gore*. This is passing strange. The only logical conclusion is that the Eleventh Circuit panel treated *Evans v. Gore* as having no binding effect.

Justice Frankfurter, who wrote for this Court in *O'Malley v. Woodrough*, 307 U.S. 277 (1939), was obviously unhappy with *Evans v. Gore*. Just as obviously, Justice Frankfurter could not muster the votes needed to overrule *Evans v. Gore*. The Eleventh Circuit incorrectly reads *O'Malley* as a virtual overruling of *Evans v. Gore*. Moore's Federal Practice does not read *O'Malley* the way the Eleventh Circuit reads it. Under the heading "Article III Judges are Protected Against Salary Reductions," Professor Moore's commentator says:

> To the extent *O'Malley* is viewed as challenging the *Evans* rationale, it would seem that, for reasons already discussed, it is *Evans* that should logically prevail. The language of Article III, it should be recalled, speaks only of salary reductions, and it would surely defy reality to suggest that such a reduction does not take place when the salaries are reduced indirectly, rather than directly. Moreover, while the courts might seek to strike down indirect reductions that actually threaten judicial independence, the difficulty and awkwardness of engaging in this equitable inquiry lies behind the protective nature of separation of powers in general. In any event, the text of Article III does not permit such a course. Either congressional action constitutes a salary reduction, in which case it is unconstitutional

> regardless of its specific effect on judicial independence, or it is not a reduction, in which case, it does not violate the Compensation Clause regardless of its effects.
>
> The Federal Circuit relied on *Evans v. Gore* in *Hatter v. United States*, in which it held that withholding of social security taxes from the salaries of judges who took office before those taxes were imposed diminished judicial salaries, in violation of the Compensation Clause. The court found that *Evans* controlled the case. The claimants were Article III judges who took office before imposition of the social security taxes in question. Federal law did not charge the claimants with the duty of paying social security taxes when they first assumed office. Subsequent imposition of the taxes reduced the claimants salaries, as in *Evans*.
>
> The Federal Circuit in *Hatter* expressed no doubts about the continued vitality of *Evans*. The court rejected the argument that because the tax was generally applicable and nondiscriminatory, it did not violate the compensation clause. It found "The words of the constitution are not so limited."

15 *Moore's Federal Practice*, ¶¶ 100.05[4][a-b] (3d ed. 1999).

In another subsection of the same treatise, entitled "No Direct Reduction in Salaries of an Article III Judge is Permitted," Professor Moore's writer asserts:

> The one issue on which all decisions appear to agree is that Congress may not directly reduce judicial salaries, regardless of Congress's motivation or the effect of the reduction on judicial salaries. This is true even if Congress

> reduces judicial salaries as part of an across-the-board reduction in federal employee salaries. It would be difficult to imagine how the result could be different, in light of the **Compensation Clause's unambiguous and unqualified prohibitions on such salary reductions.**
>
> A decision illustrating this approach is *United States v. Will*, in which the Supreme Court invalidated Congressional statutes revoking already vested annual cost-of-living adjustment in salary as violations of the Compensation Clause. In so holding, the court expressly rejected the argument that Congress could reduce judicial compensation as long as it did not single out judges during the process.

15 *Moore's Federal Practice*, ¶ 100.05[3] (3d ed. 1999) (emphasis supplied).

It is, of course, within the realm of possibility that a majority of this Court will decide that the central holding of *Evans v. Gore* should be declared "dead and buried," and that *Evans v. Gore* should be overruled, but such a momentous change of course should be made by this Court and not by the Eleventh Circuit.

As its alternative means of upholding Ordinance No. 1120 as applied to Article III judges, the Eleventh Circuit said that even if *Evans v. Gore's* "weakened grasp" maintains any grip, Acker and Clemon cannot be heard to complain because they accepted their appointments as Article III judges when Jefferson County already had the authority to set up the occupational licensing scheme that it eventually did set up, and which, incidentally, may no longer exist. The Eleventh Circuit was sufficiently uncomfortable with treating *Evans v. Gore* as overruled, to

create a way around it that was never suggested by Jefferson County or by anyone else. If Jefferson County ever dreamed of the argument made by the Eleventh Circuit, it never dreamed of making it. The bottom-line proposition arrived at by the Eleventh Circuit, by which it allowed Ordinance No. 1120 to tax the salaries of petitioners, had never been heard of until it appeared in the panel opinion. The newly minted proposition can be fairly stated as follows: "The possibility that an income tax may be enacted is enough to get around *Evans v. Gore*, or, in other words, the existence of some kind of legislative basis upon which such a tax could be justified should alert all incoming federal judges that they might one day be subjected to such a tax." If this is to become an addendum to the Compensation Clause, it will mean, of course, that "would-be" federal judges in Alabama should understand that the Constitution of Alabama, which already contains hundreds upon hundreds of amendments, can, with relative ease be amended to impose a county occupational tax on them, and therefore that the Compensation Clause gives them no protection, and thus has no real meaning. One means of "authorizing" an ordinance like Ordinance No. 1120 is as likely as another.

The Eleventh Circuit's opinion deals with theory. In theory, Acker and Clemon, before accepting their appointments, might have concluded that the act of 1967 is void on its face as a violation of Equal Protection, just as an Alabama court has concluded. The Eleventh Circuit opinion implicates an Equal Protection issue never raised in this case until now. For 20 years Jefferson County apparently had the same doubt that the Alabama courts

have expressed about the so-called enabling act, because it waited 20 years to use it. The Eleventh Circuit's idea that an enabling act is the functional equivalent of the actual adoption of a tax is facially flawed. Its idea should not be allowed to become an easy way around a constitutional provision that is the most integral part of the fundamental guaranty of an independent judiciary.

Assuming *arguendo* that *Evans v. Gore* has been, or will be, overruled, Ordinance No. 1120, nevertheless, cannot tax the salaries of Acker and Clemon. The dissenters in *Evans v. Gore* were Justices Holmes and Brandeis. While joining the majority in recognizing the importance of an independent judiciary and of the purpose served by the Compensation Clause toward that end, they wanted judges to participate fairly in the support of government. They said:

> To require a man to pay the taxes **that all other men have to pay** cannot possibly be made an instrument to attack his independence as a judge.

253 U.S. at 265 (emphasis supplied).

The dispositive fact that, even without *Evans v. Gore*, precludes the application of Ordinance No. 1120 to Acker and Clemon is that it **does not treat all taxpayers alike.** Acker and Clemon are not making the Equal Protection argument that is the basis for a State court's holding that the tax is void on its face and cannot be collected from any of its targeted income earners, including Article III judges. Acker's and Clemon's argument has a certain kinship to the Equal Protection argument, but, instead, it relies on the above-quoted language of the dissenters in

Evans v. Gore, and on the language used by this Court in *United States v. Will*, 449 U.S. 200 (1980), to describe the severe limitation upon *Evans v. Gore* imposed by *O'Malley v. Woodrough:*

> This is quite different from the situation in *O'Malley v. Woodrough*, 307 U.S. 277, 59 S.Ct. 838, 83 L.Ed. 1289 (1939). There the court held that the Compensation Clause is not offended by an income tax levied on Article III judges **as well as on all taxpayers**. There was no discrimination against the plaintiff judge. Federal judges, **like all citizens,** must share the "material burden of the government . . . ". *Id.*, at 282, 59 S. Ct. at 840.

United States v. Will, 449 U.S. at 226 (emphasis supplied).

Exactly what this Court said in *O'Malley* is this:

> . . . Congress has committed itself to the position that a non-discriminatory tax laid **generally on net income** is not, when applied to the income of a federal judge, a diminution of his salary within the prohibition of Article III, § 1 of the Constitution. To suggest that it makes inroads upon the independence of judges who took office after Congress had thus charged them with the common duties of citizenship, **by making them bear their aliquot share** of the costs of maintaining the Government, is to trivialize the great historic experience on which the framers based the safeguards of Article III, § 1. To subject them to a **general** tax is merely to recognize that judges are also citizens, and their particular function in government does not generate an immunity from **sharing with their fellow citizens** the material burden of the government

> whose constitution and laws they were charged with administering.

O'Malley v. Woodrough, 307 U.S. at 282 (emphasis supplied).

The Eleventh Circuit panel, perhaps inadvertently, acknowledged the *O'Malley* principle. But it did not recognize its significance. The Eleventh Circuit said:

> . . . it [*Evans v. Gore*] characterized the holding of *O'Malley* broadly, saying that the Compensation Clause did not exempt judges from paying **the same taxes that other citizens paid.**

Jefferson County, Ala. v. Acker, 210 F.3d at 1320 (emphasis supplied).

Acker and Clemon invite this Court to look up Justice Frankfurter's words, "aliquot share," in any good dictionary and to see if those words can be made to mean "more than what similar income earners are required to pay." Ordinance No. 1120 is clearly not a "**generally**" applicable tax. It exempts a veritable host of occupations and taxpayers. The majority of this Court which earlier disagreed with the Eleventh Circuit on the Inter-Governmental Tax Immunity issue, did not quarrel with the appendix attached to Justice Breyer's dissent. For instance, all professionals are exempt, meaning that lawyers who practice before these Article III judges who sit in Jefferson County, pay nothing. There is no way, logically, practically, or fairly, to characterize this tax as a tax on "**all taxpayers**," that is, unless "**all taxpayers**" can be given some esoteric meaning, such as "far less than 75%

of the income-earning population." There can be no difference between an income tax that targets specific occupations and an income tax that exempts a great number of occupations, leaving a bare majority to pay the entire cost of government.

If the prohibition against any diminution of Article III salaries, as articulated in *Evans v. Gore*, has been diminished by *O'Malley* so as to require Article III judges to carry a proportionate share of the tax burden, the judges' share cannot be disproportionately large in comparison to the shares of the other potential taxpayers. If Article III judges appointed after Ordinance No. 1120 was adopted are forced to pay the tax while a host of taxpayers are not, the Article III judges will bear more than their "aliquot share" of the tax burden of Jefferson County, to use Justice Frankfurter's phrase. This Court should not allow such a thing to happen.

CONCLUSION

For one, two, or all three of the reasons discussed above, Petitioners respectfully pray that this Honorable Court will grant their petition for writ of certiorari, and, after a briefing on the merits, will reverse the Court of Appeals for the Eleventh Circuit and will hold that the tax which Jefferson County seeks to collect from Petitioners, but not from many other income earners in Jefferson County, constitutes a violation of the Compensation Clause.

Respectfully submitted.

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IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 94-6400

D.C. Docket Nos. 93-00069-CV-M-S
& 93-0000196-CV-M-S

JEFFERSON COUNTY,
A political subdivision
of the State of Alabama,

Plaintiff-Appellant,

versus

WILLIAM ACKER, JR.,

Defendant-Appellee.

JEFFERSON COUNTY,
A political subdivision
of the State of Alabama,

Plaintiff-Appellant,

versus

U. W. CLEMON,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Alabama

(April 26, 2000)

ON REMAND FROM THE SUPREME COURT
OF THE UNITED STATES

Before CARNES, BARKETT and WILSON, Circuit Judges.

CARNES, Circuit Judge:

For more than seven years the validity of the occupational tax imposed by Jefferson County, Alabama Ordinance 1120 (Sept. 29, 1987), as it applies to the district court judges of the United States District Court for the Northern District of Alabama, has been litigated in federal court. *See Jefferson County v. Acker*, 850 F.Supp. 1536 (N.D.Ala.1994), *rev'd*, 61 F.3d 848 (11th Cir. 1995), *aff'd en banc*, 92 F.3d 1561 (11th Cir. 1996), *vacated*, 520 U.S. 1261, 117 S.Ct. 2429 (1997), *aff'd en banc*, 137 F.3d 1314 (11th Cir. 1998), *rev'd*, 119 S.Ct. 2069 (1999). The matter is once more back before us, again on remand from the Supreme Court, *see* 119 S.Ct. 2069, 2081, this time for what may be the last chapter in the story, at least as far as the storyline involves federal court litigation over the occupational tax.[1]

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[1] We are informed by the parties that the ordinance imposing the occupational tax has spawned litigation in state court involving challenges to it on other grounds, and more than one piece of legislation has been introduced to revise or replace the tax (one bill was actually enacted but it was struck down on unrelated state constitutional grounds).

Appellees moved for a stay of proceedings in this Court until the dust settles in the state court and legislative arena, but we denied that motion because "there does not appear to be a reasonable probability that the issue of the Appellees' liability for payment of the tax for past years will be mooted by any of the pending state judicial proceedings or by any action of the Alabama Legislature." Order Denying Motion to Stay

The issue that remains for us to address is whether application of this occupational tax to Article III judges violates the Compensation Clause, which is contained in Article III, Section 1 of the Constitution. *See* 119 S.Ct. at 2074 n.2 (noting that we had not yet addressed the issue of whether the tax violated the Compensation Clause, and that the issue was not before the Supreme Court). The district court held that application of the tax to the Appellees, both of whom had been appointed judge before enactment of the ordinance imposing the tax, violated the Compensation Clause. *See* 850 F.Supp. at 1546-48. We reach a different conclusion.

The Compensation Clause, sometimes called the Anti-Diminution Clause, provides that Article III judges, "shall at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office." U.S. Const. art. III, § 1. The Jefferson County occupational tax "is, and operates as, a tax on employees' compensation." *Jefferson County, Alabama v. Acker*, 119 S.Ct. at 2077. The Supreme Court held in *Evans v. Gore*, 253 U.S. 245, 264, 40 S.Ct. 550, 557 (1920), that an income tax on the compensation of Article III judges was unconstitutional, but the holding of that decision is limited to application of an income tax to judges appointed before the tax was enacted (and as we will

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Proceedings, February 22, 2000, Case No. 94-6400 (11th Cir.). In any event, this case is not moot as matters now stand.

Of course, we decide only the case before us, and nothing we say in this opinion is meant to imply any view on any other issues relating to the Jefferson County occupational tax.

discuss shortly, before the legislature was clearly authorized to enact the tax), which is as far as the facts of that case went, *see id.* at 246, 40 S.Ct. at 550. That limitation of the *Evans* decision was confirmed and arguably tightened in *O'Malley v. Woodrough*, 307 U.S. 277, 59 S.Ct. 838 (1939).

The issue in *O'Malley* was whether Congress had transgressed the Compensation Clause by providing in a series of revenue acts that the income tax would be applicable to all federal judges appointed after the initial date of that provision's enactment. *See id.* at 278, 59 S.Ct. at 838; *id.* at 283-84, 59 S.Ct. at 840. The Supreme Court held that application of the income tax to Article III judges who were on notice when they were appointed that the tax would be applied to them did not violate the Compensation Clause. *See id.* The Court explicitly disavowed most of what it had said in *Miles v. Graham*, 268 U.S. 501, 45 S.Ct. 601 (1925), a decision which had extended *Evans* to Article III judges appointed after the effective date the income tax was enacted. *See* 307 U.S. at 282-83 ("to the extent that what the Court now says is inconsistent with what was said in *Miles v. Graham*, 268 U.S. 501, 45 S.Ct. 601, the latter cannot survive.").

The Supreme Court had much to say in its *O'Malley* opinion about the *Evans* decision, and none of it was flattering. The Court said that "the meaning which *Evans v. Gore, supra*, imputed to the history which explains Article III, § 1 was contrary to the way in which it was read by other English-speaking courts," 307 U.S. at 281, 59 S.Ct. at 839 (footnote omitted); observed that *Evans* had "met wide and steadily growing disfavor from legal scholarship and professional opinion"; *id.*, and noted that the decision had been "rejected by most of the courts

before whom the matter came after that decision." *Id.* (footnote omitted).

The Supreme Court also spoke disparagingly in *O'Malley* of the reasoning of *Evans*, although the Court arguably limited some of that disparagement to the facts before it in the *O'Malley* case. The Court declared that even to suggest an income tax would undermine the independence of federal judges appointed after Congress had put them on notice they would have to "bear their aliquot share of the cost of maintaining the Government, is to trivialize the great historic experience on which the framers based the safeguards of Article III, § 1." *Id.* at 282, 59 S.Ct. at 840 (footnote omitted). And, the Court reasoned that, "[t]o subject them to a general tax is merely to recognize that judges are also citizens, and that their particular function in government does not generate an immunity from sharing with their fellow citizens the material burden of the government whose Constitution and laws they are charged with administering." *Id.* That reasoning about the permissibility of subjecting judges to general taxes is inconsistent with the reasoning and decision in *Evans*.

The Supreme Court recognized as much in *United States v. Will*, 449 U.S. 200, 101 S.Ct. 471 (1980), which involved Congressional action to stop or reduce previously authorized annual cost-of-living increases for certain federal officials including judges. In the course of deciding that case, the Court had this to say about the effect of *O'Malley* on *Evans:*

> In *O'Malley v. Woodrough*, 307 U.S. 277, 59 S.Ct. 838, 83 L.Ed. 1289 (1939), this Court held that the immunity in the Compensation Clause

> would not extend to exempting judges from paying taxes, a duty shared by all citizens. The Court thus recognized that the Compensation Clause does not forbid everything that might adversely affect judges. The opinion concluded by saying that to the extent *Miles v. Graham*, 268 U.S. 501, 45 S.Ct. 601, 69 L.Ed. 1067 (1925), was inconsistent, it "cannot survive." 307 U.S., at 282-283, 59 S.Ct., at 840. Because *Miles* relied on *Evans v. Gore*, *O'Malley* must also be read to undermine the reasoning of *Evans*, on which the District Court relied in reaching its decision.

Will, 449 U.S. at 227 n. 31, 101 S.Ct. at 486 n. 31. So, in *Will* the Supreme Court itself read *O'Malley* as undermining the reasoning of *Evans*, and it characterized the holding of *O'Malley* broadly, saying that the Compensation Clause did not exempt judges from paying the same taxes that other citizens paid.

Admittedly, in *Will* the Supreme Court did not use the magic word "overruled" in talking about *Evans*, but the Court came as close to overruling that earlier decision as it could without actually uttering the word. Given the severity of the blows *O'Malley* and *Will* inflicted upon *Evans* one might suggest it is time to recognize that *Evans* is dead and gone. *Cf. White v. Lemacks*, 183 F.3d 1253, 1259 (11th Cir. 1999) ("Enough is enough. Like a favorite uncle who has passed away in the parlor, [our decision in] *Cornelius* needs to be interred. We do so now. Recognizing that it was dealt a fatal blow by [the Supreme Court's decision in] *Collins*, we pronounce *Cornelius* dead and buried."). The problem is that the Supreme Court has insisted on reserving to itself the task of burying its own decisions. We have been told more than once by it that,

"[i]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court, the prerogative of overruling its own decisions." *Rodriguez de Quijas v. Shearson/ American Express, Inc.*, 490 U.S. 477, 484, 109 S.Ct. 1917, 1921-22 (1989); *accord, e.g., Agostini v. Felton*, 521 U.S. 203, 237, 117 S.Ct. 1997, 2017 (1997) ("We do not acknowledge, and we do not hold that other courts should conclude our more recent cases have, by implication, overruled an earlier precedent."). We have followed that admonition. *See Brisentine v. Stone & Webster Engineering Corp.*, 117 F.3d 519, 525 (11th Cir. 1997) ("It may be that the Supreme Court has cut *Alexander* back so far that it will not survive. Perhaps, but we are not convinced we are authorized to sing the dirge of *Alexander*. We will leave that to the Supreme Court, which has admonished courts of appeals . . . '[to leave it] the prerogative of overruling its own decisions.' ") (quoting *Rodriguez de Quijas*, 490 U.S. at 484, 109 S.Ct. at 1921-22); *Engineering Contractors Ass'n v. Metropolitan Dade County*, 122 F.3d 895, 908 (11th Cir. 1997).

There is, however, a difference between following a precedent and extending a precedent. That difference, as it relates to a lower court's duty to follow moribund Supreme Court decisions, is manifest in the words "which directly controls," the limiting phrase the Court used in *Rodriguez*, 490 U.S. at 484, 109 S.Ct. at 1921, to express our duty to follow one of its decisions whose reasoning has been undermined by later decisions. Where a Supreme Court decision that has not been overruled is squarely on point and therefore "directly controls" the

case at hand, we are to follow it even though convinced that the Court will overturn that decision the next time it addresses the issue. But if the facts of a gravely wounded Supreme Court decision do not line up closely with the facts before us – if it cannot be said that decision "directly controls" our case – then, we are free to apply the reasoning in later Supreme Court decisions to the case at hand. We are not obligated to extend by even a micron a Supreme Court decision which that Court itself has discredited. Sometimes, perhaps oftentimes, the correct course will be illuminated by our attempt to reconcile the later Supreme Court decision with the earlier one, an attempt we are obligated to make. *Cf. United States v. Hogan*, 986 F.2d 1364, 1369 (11th Cir. 1993) ("A panel of this Court is obligated, if at all possible, to distill from apparently conflicting prior panel decisions a basis of reconciliation and to apply that reconciled rule.").

The *Evans* decision "directly controls" the case in which federal judges appointed before the federal income tax was even authorized are subjected to it. Recall that the plaintiff in *Evans* was appointed in 1899, 253 U.S. at 246, 40 S.Ct. at 550, four years after the Supreme Court had struck down as unconstitutional a prior federal income tax, *see Pollock v. Farmers' Loan & Trust Co.*, 158 U.S. 601, 15 S.Ct. 912 (1895). At the time of his appointment, not only was there no income tax on the books, it would be another fourteen years before the Sixteenth Amendment was ratified in 1913, authorizing Congress to "lay and collect taxes on incomes, from whatever source

derived. . . . "[2] That is the context in which the *Evans* Court said that the "necessary operation and effect" of applying the income tax to the judge plaintiff in that case would be to "withhold or take from the judge a part of that which was promised by law for his services. . . . " 253 U.S. at 254, 40 S.Ct. at 553. The Supreme Court has extended the holding of *Evans* beyond its facts only once, and that was in *Miles v. Graham*, which *O'Malley* explicitly overruled, 307 U.S. at 282-83, 59 S.Ct. at 840 (saying that *Miles* "cannot survive").

The judge plaintiff in *O'Malley* was appointed in 1933, after the Sixteenth Amendment was ratified, and after enactment of the legislation making the challenged tax applicable to federal judges. 307 U.S. at 279, 59 S.Ct. at 838. The *Evans* and *O'Malley* decisions are reconcilable, if at all, on the basis of the nature and amount of notice the plaintiff had at the time of appointment that his compensation could be subject to the tax in question. In *O'Malley* the judge had reasonable notice at the time of appointment that his compensation would be – or might be, since there was no certainty in those early days the tax would not be repealed – subject to the federal income tax. *See* 307 U.S. at 279, 59 S.Ct. at 838-39 ("For it was the

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[2] The income tax acts of 1913, chapter 16, 38 Stat. 168, 1916, chapter 463, 39 Stat. 758, and 1917, chapter 63, 40 Stat. 329, excluded the compensation of federal judges from the tax. *Evans*, 253 U.S. at 259, 40 S.Ct. at 555. The 1919 act, which was involved in the *Evans* case, explicitly included the compensation of "the judges of the Supreme and inferior courts of the United States." Comp. St. Ann. Supp.1919, § 6336; *Evans*, 253 U.S. at 246, 40 S.Ct. at 550.

Act of June 6, 1932 [which, like other income tax legislation, was authorized by the Sixteenth Amendment] that gave notice to all judges thereafter to be appointed, of the new Congressional policy to include the judicial salaries of such judges in the assessment of income taxes."). By contrast, the judge plaintiff in *Evans* did not have reasonable notice at the time of his appointment that his compensation might be subject to a federal income tax, because an attempt to levy a broad income tax previously had been struck down, and the constitutional amendment superceding that decision had not yet been adopted at the time the judge was appointed. Although Congress probably could have enacted an income tax limited to salary and compensation without the specific authorization of the Sixteenth Amendment, *see Pollock*, 158 U.S. at 636-37, 15 S.Ct. at 920, it was most unlikely to do so, *id.* ("We cannot believe that such was the intention of Congress."), and indeed did not.

The facts of the present case are not directly controlled by *Evans*. It is true that the occupational tax at issue here was not enacted until after these two plaintiff judges were appointed to office: one was appointed in 1980, the other in 1982, and the ordinance imposing the tax was enacted in 1988. But at the time these judge plaintiffs were appointed, Alabama Act 406, which had been on the books since 1967, specifically authorized "Jefferson County to impose a privilege, license, or occupational tax upon all persons engaged in any vocation, occupation, calling, or profession who are not required by state law to pay such a tax to the State of Alabama." *See Jefferson County v. Acker*, 850 F.Supp. 1536, 1538 (N.D.Ala.1994). Whatever may happen to that Alabama

law in the future, at the time these judges were appointed, it put them on clear notice that under Alabama law they could be subjected by Jefferson County to a tax on their compensation. Federal law was clear about that, too. The Public Salary Tax Act of 1937,[3] 4 U.S.C. § 111, and the Buck Act, 4 U.S.C. § 106,[4] which was enacted in 1939, put federal judges on notice that their compensation was subject to a non-discriminatory state or local tax on compensation, which is what Jefferson County's occupational tax is, *see* 119 S.Ct. at 2080-81. The joint effect of Alabama Act 406, the Public Salary Tax Act, and the Buck Act, was to hang over the compensation of federal judges working

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[3] The Public Salary Tax Act, 4 U.S.C. § 111, states:

> The United States consents to the taxation of pay or compensation for personal service as an officer or employee of the United States, a territory or possession or political subdivision thereof, the government of the District of Columbia, or an agency or instrumentality of one or more of the foregoing, by a duly constituted taxing authority having jurisdiction, if the taxation does not discriminate against the officer or employee because of the source of the pay or compensation.

[4] The Buck Act, 4 U.S.C. § 106(a) states:

> No person shall be relieved from liability for any income tax levied by any State, or by any duly constituted taxing authority therein, having jurisdiction to levy such a tax, by reason of his residing within a Federal area or receiving income from transactions occurring or services performed in such area; and such State or taxing authority shall have full jurisdiction and power to levy and collect such tax in any Federal area within such State to the same extent and with the same effect as though such area was not a Federal area.

in Jefferson County a sword of Damocles (or given that the tax rate ultimately imposed was only one-half of one percent, perhaps we should refer to it as a pen knife of Damocles). True, the blade did not fall until years later, but it hung there nonetheless at the time these two judges were appointed. That is notice enough for the tax to escape the weakened grasp of the *Evans* decision. To hold otherwise would require us to extend *Evans*, and that we will not do.[5]

The judgment of the district court is REVERSED, and this case is REMANDED for proceedings consistent with this opinion.

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[5] The decision in *Hatter v. United States*, 64 F.3d 647 (Fed.Cir.1995), is not binding on us, and to the extent that its reasoning or result is inconsistent with our own, we are unpersuaded by it.

Because of our disposition of the case on other grounds, we need not and do not reach Jefferson County's alternative argument that the Compensation Clause does not apply to state and local legislative measures anyway.

In The United States Court Of Appeals
FOR THE ELEVENTH CIRCUIT

No. 94-6400-AA

JEFFERSON COUNTY,
A political subdivision
of the State of Alabama,

Plaintiff-Appellant,

versus

WILLIAM ACKER, JR.,

Defendant-Appellee.

JEFFERSON COUNTY,
A political subdivision
of the State of Alabama,

Plaintiff-Appellant,

versus

U.W. CLEMON,

Defendant-Appellee.

On Appeal from the United States District Court
for the Northern District of Alabama

ON PETITION(S) FOR REHEARING AND
SUGGESTION(S) OF REHEARING EN BANC

(Opinion _____, 11th Cir., 19___, ___F.2d___).

(Filed Jun. 27, 2000)

Before: CARNES, BARKETT and WILSON, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be poled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ [Illegible]
UNITED STATES CIRCUIT JUDGE

U.S. Const., Art. III, § 1 [Judicial Power, Tenure of Office]

The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services a Compensation which shall not be diminished during their Continuance in Office.

OCCUPATIONAL TAX
of
JEFFERSON COUNTY
ALABAMA

Adopted by Ordinance Number 1120
of Jefferson County Commission
September 29, 1987

DAVID ORANGE, President
Jefferson County Commission
Commissioner of Finance & General Services

REUBEN DAVIS
Commissioner Health & Human Resources

JIM GUNTER
Commissioner Community & Economic Development

CHRIS McNAIR
Commissioner
Environmental Services

DR. JOHN KATOPODIS
Commissioner Roads & Transportation

ORDINANCE NO. 1120

An Ordinance to establish a license or privilege tax on persons engaged in any vocation, occupation, calling or profession in Jefferson County who is not required by law to pay any license or privilege tax to either the State of Alabama or the County as set out herein.

BE IT RESOLVED AND ORDAINED by the Jefferson County Commission as follows:

Section 1. DEFINITIONS. That the following words, when used in this Ordinance, shall have the meaning ascribed to them, except where the context clearly indicates or requires a different meaning:

(A) The word "person" shall mean any natural person. Whenever the word "person" is used in any clause

prescribing and imposing a penalty in the nature of a fine *or imprisonment, the work as applied to a partnership* or other form of unincorporated enterprise shall mean the partners or members thereof, and as applied to corporations shall mean the officers and directors thereof.

(B) The words "vocation, occupation, calling and profession" shall mean and include the doing of any kind of work, the rendering of any kind of personal services, or the holding of any kind of position or job within Jefferson County, Alabama, by any clerk, laborer, tradesman, manager, official or other employee, including any non-resident of Jefferson County who is employed by any employer as defined in this section, where the relationship between the individual performing the services and the person for whom such services are rendered is, as to those services, the legal relationship of employer and employee, including also a partner of a firm or an officer of a firm or corporation, if such partner or officer receives a salary for his personal services rendered in the business of such firm or corporation, but they shall not mean or include domestic servants employed in private homes and shall not include businesses, professions or occupations for which license fees are required to be paid under any General License Code of the County or to the State of Alabama or the County by any of the following: Chapter 12, Article 2, Title 40; §§ 40-21-50, 40-21-52, 53, 54 and 55; 40-21-57, 58, 59, and 60; 40-16-6; and 27-4-9 of the Code of Ala. 1975, as amended.

(C) The words "vocation, occupation, calling and profession" shall also mean and include the holding of any kind of office or position either by election or appointment, by any federal, state, county or city officer

or employee where the services of such official or employee are rendered within Jefferson County, Alabama.

(D) The word "employee" shall mean and include any person engaging in or following any vocation, occupation, calling or profession within the meaning of subsection (B) of Section 1 of this Resolution and Ordinance.

(E) The word "employer" shall mean and any person, business, firm, corporation, include any partnership, association or any other kind of organization who or that employs any person in any vocation, occupation, calling or profession in Jefferson County, Alabama, within the meaning of subsection (B) of Section 1 of this Ordinance.

(F) The words "gross receipts" and "compensation" shall have the same meaning, and both words shall mean and include the total gross amount of all salaries, wages, commissions, bonuses or other money payment of any kind, or any other considerations having monetary value, which a person receives from or is entitled to receive from or be given credit for by his employer for any work done or personal services rendered in any vocation, occupation, calling or profession, including any kind of deductions before "take home" pay is received; but the words "gross receipts" and "compensation" shall not mean or include amounts paid to traveling salesmen or other workers as allowance or reimbursement for traveling or other expenses incurred in the business of the employer, except to the extent of the excess of such amounts over such expenses actually incurred and accounted for by the employee to the employer.

(G) The word "licensee" shall mean and include any person required to file a return or to pay a license fee under this ordinance.

(H) The word "county" shall mean Jefferson County, Alabama.

(I) The words "Director of Revenue" shall mean the Director of Revenue of Jefferson County, Alabama.

(J) The singular shall include the plural and vice versa, and the masculine shall include the feminine and the neuter.

Section 2. LICENSE FEES REQUIRED. It shall be unlawful for any person to engage in or follow any vocation, occupation, calling or profession as defined in Section 1 within the County on and after the 1st day of January, 1988, without paying license fees to the county for the privilege of engaging in or following such vocation, occupation, calling or profession, which license fees shall be measured by one-half percent (1/2%) of the gross receipts of each such person.

Section 3. WHERE WORK DONE OR SERVICES PERFORMED BOTH WITHIN AND WITHOUT THE COUNTY. In cases where compensation is earned as a result of work done or services performed both within and without the county, the license fees required under this Ordinance shall be computed by determining upon the oath of the employer, or if required by the Director of Revenue upon the oath of the employee, that percentage of the compensation earned from the proportion of the work which was done or performed within the County.

Section 4. EMPLOYERS TO WITHHOLD LICENSE FEES AND FILE RETURNS. Each employer shall deduct from each payment due each employee the amount of the license fees measured by one-half per centum (1/2%) of the compensation due each employee beginning on the 1st day of January, 1988. The payments required to be made on account of such deductions by employers shall be made monthly to the county for the monthly periods ending January 31, February 28, March 31, April 30, May 31, June 30, August 31, September 30, October 31, November 30 and December 31st of each year, on or twentieth day of the month next following of each such monthly period, and each shall at the same time make a return in therewith on a form made available to such by the Director of Revenue at the office of the Director of Revenue, provided that, if the total deducted from payments made to or due at of an employer is less than fifty ($50.00) dollars during each calendar month of the previous calendar year, then such employer may elect, for the current calendar year, to remit such deductions to the County for the quarterly periods ending March 31st, June 30th, September 30th and December 31st of such following calendar year, on or before the twentieth day of the month next following the end of each such period, and each such employer shall at the same time make a return in connection therewith on a form made available to such employer by the Director of Revenue at the office of Director of Revenue. Provided, however, that the failure or omission by any employer to deduct such license fees shall not relieve an employee from the payment of such license fees and compliance with the requirements for taking returns as provided in this Ordinance, or with any

regulations promulgated under this Ordinance. Each employer shall file in the office of the Director of Revenue on or before January 31, of each year a return on a form made available by said Director of Revenue, at the office of said Director of Revenue, which return shall show the gross amount of compensation of each employee, the amount of license fees deducted and paid by such employer for all or any part of the preceding calendar year and the last known address of each such employee. Each employer shall keep accurate records of all such compensation, reductions, license fees, payments and returns. Such records shall be kept and maintained by each such employer for not less than five (5) years subsequent to the date such compensation was earned.

Section 5. RETURNS TO BE FILED BY EMPLOYEES. When a monthly or quarterly return, as required by Section 4 hereof is not filed by an employer and the license fees are not paid to the County by such employer monthly as herein provided, the employee for whom no return has been filed and no payment has been made shall file a return with the Director of Revenue on or before the 1st day of the second month next following the end of each such monthly or quarterly period, showing in said return his gross receipts subject to license fees for such month or quarter, and he shall also file a return with the Director of Revenue on or before January 31st of each year thereafter in which his employer has failed to file any monthly or quarterly return required in the preceding calendar year, showing on said return the gross receipts subject to license fees during the preceding calendar year. If for any reason all license fees of a person

subject to the provisions of this Ordinance were not withheld by his employer from his gross receipts, such person shall file each return required by this section on a form obtainable at the office of the Director Of Revenue. In addition to the gross receipts earned by him, such return shall show such other pertinent information as may be required by the Director of Revenue. Each person making a return required by the Section shall, at the time of filing thereof, pay to the County the amount of license fees due under this Ordinance; Provided, however, that any portion of the license fees deducted at the source shall be deducted on the return and only the balance, if any, shall be due and payable at the time of filing said return. Each employee shall keep accurate records of all such compensation, deductions, license fees, payments and returns. Such records shall be kept and maintained by each such employee for not less than five (5) years subsequent to the date such compensation was earned.

Section 6. DUTIES OF THE DIRECTOR OF REVENUE. It shall be the duty of the Director of Revenue to collect and receive all license fees imposed by this Ordinance and to keep records showing the amounts received by him from each employer. All moneys received by the Director of Revenue shall be deposited in a duly approved depository.

Section 7. INVESTIGATIVE POWERS OF THE DIRECTOR OF REVENUE. The Director of Revenue or any agent or employee designated by him is hereby authorized to examine the books, papers and records of any employer or supposed employer, or of any licensee or supposed licensee, in order to determine the accuracy of any return made, or if no return was made to ascertain

the amount of license fee due under the terms of this Ordinance by such examination. Each such employer or supposed employer or licensee or supposed licensee shall give to the Director of Revenue, or to his duly authorized agent or employee, the means, facilities and opportunity for the making of such examination and investigation. The Director of Revenue is hereby authorized to examine any person under oath concerning any gross receipts which were or should have been shown in a return, and to this end he may compel the production of books, papers, records and the attendance of all persons before him, whether as parties or as witnesses, whom he believes to have knowledge of such gross receipts or compensation.

Section 8. REGULATIONS MAY BE PROMULGATED. The Director of Revenue may prescribe, adopt, promulgate and enforce reasonable rules and regulations not in conflict with this Ordinance relating to any matter or thing pertaining to the administration and enforcement of the provisions of this Ordinance, including but not limited to provisions for the reexamination and correction of returns as to which overpayment or underpayment is claimed or found to have been made, and the regulations so promulgated shall be binding upon all licensees and employers.

Section 9. INFORMATION TO BE CONFIDENTIAL. Notwithstanding any resolutions and ordinances to the contrary, any information gained by the Director of Revenue or any other official or agent or employee of the County as a result of any returns, or verifications required or investigations, hearings, authorized by this

Ordinance shall be confidential, except for official purposes, or in accordance with proper judicial officer, or the enforcement of this Ordinance, and any person or agent divulging such information, except as herein permitted, shall upon conviction be subject to a fine of not more than One Hundred Dollars ($100.00) or to imprisonment of not exceeding thirty (30) days, or to both such fine and imprisonment.

Section 10. INTEREST AND PENALTIES.

(A) All license fees imposed by this Ordinance which are delinquent, that is, which remain unpaid after they become due shall, subject to the provisions hereinafter set out, bear interest at the rate of twelve percentum (12%) per annum, and any person who has failed to pay such license fees when the same became due shall, subject to the provisions hereinafter set out, also be charged a penalty of ten percentum (10%) of the amount of such unpaid license fees. Any person or employer who fails or refuses to withhold any license fees payable under this Ordinance, or who fails to pay such fees after withholding the same to the County at the time it is due, as provided under the provisions of Section 4 hereof, shall become liable to the County for such fees, as well as for the interest thereon at the rate of twelve percentum (12%) per annum, and for the aforesaid penalty. Provided, however, that the minimum penalty imposed against, such person or employer shall be Three Dollars ($3.00). Provided the Director of Revenue, if a good and sufficient reason is shown for the failure to pay the tax within the time required, may waive or remit the penalty and interest or a portion of either, upon payment of the tax due.

(B) Any person or employee who shall fail neglect or refuse to pay a license fee as by this Ordinance required, or any employer who shall fail to withhold said license fees, or to pay over to County such license fees, penalties or interest imposed by this Ordinance, or any person required to file a return under the provisions of Section 5 of this Ordinance, who shall fail, neglect or refuse to file such return, or any person or employer who shall refuse to permit the Director of Revenue or any agent or employee designated by him, in writing, to examine his books, records and papers for any purpose authorized by this Ordinance, or who shall knowingly make any incomplete, false or fraudulent return, or who shall attempt to do anything whatever to avoid the full disclosure of the amount of gross receipts or compensation in order to avoid the payment of the whole or any part of a license fee, shall upon conviction be subject to punishment within the limits of and as provided by law for each offense. Such punishment shall be in addition to the penalties imposed under subsection (A) of this section.

Section 11. EXTENSION OF TIME FOR MAKING RETURN. The Director of Revenue, for good cause, may extend the time for making any return required under the provisions of this Ordinance, but the time for filing any such return shall not be extended for a greater period than thirty (30) days from the day such return is due to be made and shall not prevent penalty and interest from accruing during the period of such extension.

Section 12. USE OF LICENSE FEES. All money derived from license fees under the provisions of this

Ordinance shall be paid to the General Fund of the County and expended as authorized by law.

Section 13. SEVERABILITY. The provisions of this Ordinance are severable. If any provision, section, paragraph, sentence or part thereof, or the application thereof to any employer or licensee or class or persons, shall be held unconstitutional or invalid, such decision shall not affect or impair the remainder of the Ordinance, it being the legislative intent to ordain and enact each provision, section, paragraph, sentence and part thereof, separately and independently of each other.

Section 14. REPEAL OF RESOLUTION AND ORDINANCES. All resolutions and ordinances or parts of resolutions and ordinances in conflict with this Ordinance are to the extent of such conflict hereby repealed.

Section 15. EFFECTIVE DATE. This Ordinance shall be in full force and effect on and after January 1, 1988, and from year to year thereafter, until repealed.

JEFFERSON COUNTY, a Political subdivision of the State of Alabama, Plaintiff,

v.

William M. ACKER, Jr., Defendant.

JEFFERSON COUNTY, a Political subdivision of the State of Alabama, Plaintiff,

v.

U.W. CLEMON, Defendant.

Nos. 93-M-0069-S, 93-M-0196-S.

United States District Court, N.D. Alabama, Southern Division.

March 31, 1994.

ORDER

MOYE, District Judge.

These actions come before the Court on cross-motions for summary judgment, as well as certain procedural motions. They were filed in the District Court of Jefferson County, Alabama, seeking to recover taxes allegedly due plaintiff by defendants pursuant to Jefferson County Ordinance No. 1120 of 1987, and subsequently were removed to this Court pursuant to 28 U.S.C. § 1442. By order of February 23, 1993, these actions have been consolidated.

The parties agree that the relevant, material facts in this case are relatively simple and undisputed and that the issues presented involve questions of law only.[1] The

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[1] Defendant Acker points out, however, that at most, plaintiff would be entitled to partial summary judgment on the issue of liability only because the amounts which defendants would owe in the event of liability are contested.

material undisputed facts are set out in Attachment A to this Order.

The questions of law presented by the cross-motions for summary judgment are:

> (1) Does Jefferson County Ordinance 1120 discriminate against defendants by reason of the federal source of their pay or compensation contrary to 4 U.S.C. §§ 105-111?

(2) If not, does Jefferson County Ordinance 1120 contravene the Constitution of the United States as applied to the defendant Article III judges?

I. MOTIONS FOR SUMMARY JUDGMENT

A. Statutory Construction

Plaintiff, Jefferson County, claims the right to impose "a privilege, license or occupational tax" upon defendants pursuant to: (1) Jefferson County Ordinance No. 1120 which imposes a tax of 1/2 of 1% on the gross income from the "vocation, occupation, calling or profession" subject to the tax; (2) Alabama Act 406 of 1967, (3) 4 U.S.C. § 111 (the Public Salary Act), and (4) 4 U.S.C. §§ 105-110 (the Buck Act). Defendants, United States District Judges, claim that the imposition of such "a license or privilege tax" would be unconstitutional as applied to them, or, if constitutional, discriminatory as so applied by reason of the source of their pay or compensation contrary to 4 U.S.C. § 111. The issues, therefore, initially require statutory construction, for generally a court must first determine whether the applicable statutes can be construed to avoid a constitutional determination.

Alabama Act 406, approved September 7, 1967, the enabling act,[2] authorizes Jefferson County to impose a privilege, license or occupational tax upon all persons engaged in any vocation, occupation, calling or profession who are not required by state law to pay such a tax to the State of Alabama. The ordinance itself, enacted pursuant thereto, imposes a privilege, license or occupation tax upon all persons engaged in any "vocation, occupation, calling or profession . . . within the county" not subjected by state law to a privilege, license or occupational tax. The Court regards this as an exercise of the County's taxing, not its police, power.

A federal judge, in performing his or her official duties clearly is engaged in a "vocation," "occupation," "calling" or "profession." A federal judge is not required by state law to pay a privilege, license or occupational tax to the State of Alabama. The language of Act 406 and of Ordinance 1120 therefore clearly embraces defendant judges.

In 1939, the United States Congress expressly consented to taxation of federal officers' "pay or compensation" by a state or local government.

> The United States consents to the taxation of pay or compensation for personal service as

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[2] Plaintiff, a creature of the State, can impose no tax without authority from the State to do so. *See* Plaintiff's brief filed May 13, 1993, page 16, and cases cited. Plaintiff has no such authority to impose an "income" tax. *See Estes v. City of Gadsden*, 266 Ala. 166, 94 So.2d 744 (1957) and cases cited; *McPheeter v. City of Auburn*, 288 Ala. 286, 259 So.2d 833 (1972); *Bedingfield v. Jefferson County*, 527 So.2d 1270 (Ala.1988).

> an officer or employee of the United States, a territory or possession or political subdivision thereof, the government of the District of Columbia, or an agency or instrumentality of one or more of the foregoing, by a duly constituted taxing authority having jurisdiction, if the taxation does not discriminate against the officer or employee because of the source of the pay or compensation.

4 U.S.C. § 111. Further, the Buck Act of 1947 provided:

> [n]o person shall be relieved from liability for any income tax levied by any State, or by any duly constituted taxing authority therein, having jurisdiction to levy such a tax, by reason of his residing within a Federal area or receiving income from transactions occurring or services performed in such area; and such State or taxing authority shall have full jurisdiction and power to levy and collect such tax in any Federal area within such State to the same extent and with the same effect as though such area was not a Federal area.
>
> 4 U.S.C. § 106(a).

Both 4 U.S.C. § 111 and the Buck Act, 4 U.S.C. §§ 105-110, are facially applicable to the factual situation in this case since a defendant judge's salary undoubtedly constitutes "pay or compensation for personal service as an officer or employee of the United States" and "income from . . . services performed in such [federal] area." The term "income tax" as used in the Buck Act, 4 U.S.C. §§ 105-109, is defined in 4 U.S.C. § 110(c) as "*any tax* levied on, with respect to, *or measured by*, net income, gross income or gross receipts," *id.* (emphasis added),

and the tax here involved is clearly "measured by" gross income.

In *Bedingfield v. Jefferson County*, 527 So.2d 1270 (Ala.1988), the Alabama Supreme Court upheld Ordinance No. 1120 against the claim that it violates the Alabama Constitution. Although in its opinion the Alabama Supreme Court did not specifically address the issue of whether Ordinance No. 1120 imposes an unauthorized "income tax,"[3] by affirming the trial court (which apparently did consider that issue) it necessarily ruled, at least implicitly, that the tax involved is a valid license tax and is not an income tax.

In fact, the Alabama Supreme Court had previously ruled that another city's virtually identical tax is a "license" tax permitted by the Alabama Constitution, and not an "income" tax. *Estes v. City of Gadsden*, 266 Ala. 166, 94 So.2d 744 (1957). The *Estes* Court reasoned: "[i]t will be observed that the amount of the instant tax is measured entirely by gross receipts and, therefore, it is argued that this shows that this is an income tax. But this provision is merely a manner of measuring the tax." *Id.* at 750. In arriving at that result, the *Estes* court quoted from *Nachman v. State Tax Comm'n*, 233 Ala. 628, 173 So. 25 (1937):

> [t]his court more than seventy years ago committed itself to the proposition that a tax upon "the gross amount of sales of merchandise" was not . . . a *property* or *income tax*, but an

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[3] Since Alabama itself levies an income tax upon all its citizens (Amendment 25 to Alabama Constitution of 1901) such a tax by a county would appear to be prohibited by Article IV, Section 105 of that Constitution.

> occupation or privilege tax, the amount being regulated by the extent to which the privilege has been enjoyed.
>
> *Id.* at 31 (citation omitted) (emphasis in original).

[1] Nevertheless, the determination by the Alabama courts that such a County Occupational Tax is a privilege-license tax, and not an "income" tax, is not determinative in this proceeding. The determination of what is an "income tax" under the Buck Act is a question of federal law. *Howard v. Commissioners of Sinking Fund*, 344 U.S. 624, 73 S.Ct. 465, 97 L.Ed. 617 (1953). Under federal law, in a case subject to the Buck Act, the method of measurement alone may determine whether a tax is an "income tax." In *Howard*, a Buck Act case, the Supreme Court held that an occupational tax or license fee imposed by the City of Louisville for the privilege of working within the city, albeit in a federal enclave, measured by one percent of income earned within the city, was an "income tax" within the meaning of the Buck Act. "Since the area is within the boundaries of the City of Louisville, and this tax is an income tax within the meaning of the Buck Act, the tax is valid." *Id.* at 629, 73 S.Ct. at 468. But Justice Douglas, joined by Justice Black, dissented. "The exclusions emphasize that the tax is on the *privilege* of working or doing business in Louisville.. . . . The Congress has not yet granted local authorities the right to tax the privilege of working for or doing business with the United States." *Id. See also United States v. Lewisburg Area Sch. Dist.*, 539 F.2d 301, 301-11 (3d Cir.1976) (applying the Buck Act

definition to a school district occupational tax, following *Howard*).[4]

[2] Similarly, the question of the applicability of 4 U.S.C. § 111, the Public Salary Act, is to be decided under federal law. In *United States v. City of Pittsburgh*, 757 F.2d 43 (3d Cir.1985), decided under the Public Salary Act, the court held that a federal court reporter's fees for the sale of transcripts were "compensation" within the meaning of 4 U.S.C. § 111 which could be taxed under Pittsburgh's business privilege tax. The court noted that "Congress was aware that the states used a variety of forms of income taxes, including gross income taxes and occupational taxes." *Id.* at 47 (citation omitted). The court held that 4 U.S.C. § 111 constitutes consent to the state or local taxation of pay or compensation received by a federal officer or employee, and "waived the United States' right to constitutional sovereign immunity from state taxation of federal employees' income." *City of Pittsburgh*, 757 F.2d at 46. *Accord: Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 812, 109 S.Ct. 1500, 1506, 103 L.Ed.2d 891 (1989).

[3] Since it is undisputed that the Jefferson County Occupational Tax is measured by gross receipts, this Court must conclude that the tax is an "income tax" for

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[4] The *Lewisburg* Court apparently had no trouble with an "assessment" based on the "average income of the profession," a method of assessment virtually indistinguishable from a flat license fee for each "profession." 539 F.2d at 310. Yet nominal, per-capita taxes remain prohibited. *Id.* at 311; *United States v. City and County of Denver*, 573 F.Supp. 686 (1983). It is the principle which is important, not the practical impact upon the federal taxpayer.

purposes of the Buck Act. Although the court in *Pittsburgh* referred to the "taxation of . . . income" (which normally indicates receipt of income as the taxable event) the tax involved was denominated a "business privilege tax" which, again, would normally indicate a franchise or privilege tax.

[4] Defendants suggest that Ordinance 1120 violates the antidiscrimination provision of 4 U.S.C. § 111 in that a great number of potential taxpayers are exempted, or able to pay much less in taxes, because persons required to pay a license tax to the state itself are exempted from taxation under the ordinance. The record so shows. It is clear that factual discrimination is present, but not necessarily that it rises to the level of legal discrimination. Classification for the purpose of municipal licensing[5] does not require any rigid rule of equality of taxation. It must be substantially fair, but need not be precisely or mathematically equal in operation and effect. However, it may not be arbitrary, capricious or unreasonable. *See* Eugene McQuillin, *Municipal Corporations*, § 26.60, at 165-66 (3d ed. 1986); *McPheeter*, 259 So.2d at 833 (1972); *Estes*, 94 So.2d at 751. The record now before this Court does not demonstrate as a matter of law that any inequality here rises to such a level. Thus, the Court finds the evidence brought to its attention by defendants will not, at this juncture, support defendants' motion for summary judgment on the issue of discrimination.

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[5] The federal consent ascribed to the Public Salary Act and the Buck Act would not alter the actual nature, characteristics and legal requirements of the tax as imposed by Alabama law.

Therefore, at this point the Court concludes:

1. Jefferson County Ordinance 1120 imposes a "license or privilege tax" upon the performance of defendants' duties as United States District Judges measured by that portion of their incomes earned while physically sitting in the United States Courthouse located in Jefferson County, Alabama.

2. Since the area (the United States District Courthouse in Birmingham, Alabama) is within the boundaries of (Jefferson County), and this (license or privilege) tax is an "income tax" within the meaning of the Buck Act, and purports to be levied "upon" the pay or compensation of defendants, the tax is valid facially. *Howard*, 344 U.S. at 624, 73 S.Ct. at 465; *Pittsburgh*, 757 F.2d at 46-48.

In *Howard*, however, the Court recognized that interference with the jurisdiction of the United States might constitute an exception to its brief holding:

> [t]he fiction of a state within a state can have no validity to prevent the state from exercising its power over the federal area within its boundaries, so long as there is no interference with the jurisdiction asserted by the Federal Government. The sovereign rights in this dual relationship are not antagonistic. Accommodation and cooperation are their aim. It is friction, not fiction, to which we must give heed.

Howard, 344 U.S. at 627, 73 S.Ct. at 467. *See also* 4 U.S.C. § 107[6]; *United States v. State Tax Comm'n of Mississippi*, 412 U.S. 363, 379, 93 S.Ct. 2183, 2193, 37 L.Ed.2d 1

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[6] "The provisions of . . . [4 U.S.C. § 106(a)] shall not be deemed to authorize the levy or collection of any tax on or from

(1973). Consideration of whether the ordinance at issue constitutes an "interference with the jurisdiction asserted by the Federal Government" so as to involve antagonistic "sovereign rights" involves a constitutional inquiry since the boundary between sovereign federal rights and sovereign state rights is to be found in Article VI, Clause 2 of the United States Constitution. Other constitutional questions arise under Articles II (as it relates to appointment of federal judges) and III of the Constitution of the United States.

B. Constitutional Construction

1. *Is the tax unconstitutional as a direct tax on the United States?*

[5] Defendants contend that Jefferson County Ordinance No. 1120 contravenes the Supremacy Clause, Article VI, Clause 2, of the United States Constitution insofar as it purports to make it unlawful for defendants to *hold the office* of United States District Judge (Ordinance 1120, § 1(c)) *or perform their duties* as federal judges in Jefferson County without paying the license or privilege tax imposed by the ordinance. Ordinance 1120, § 2. It is therefore necessary to determine: (1) the present scope of constitutional intergovernmental tax immunity, and (2) to what extent that immunity is subject to statutory waiver.

To begin, it is basic that the necessary independence of both the federal and state governments forbids that either should tax the courts or the judicial process of the

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the United States or any instrumentality thereof. . . . " 4 U.S.C. § 107.

other. *Smith v. Short*, 40 Ala. 385 (1867). *See M'Culloch v. Maryland*, 17 U.S. (4 Wheat) 316, 429-33, 4 L.Ed. 579 (1819); 84 C.J.S. § 125 (1954 & Supp.1993). In *Smith v. Short*, the majority, proceeding directly to the issue of the constitutional limitations on taxation of judicial process[7], reasoned:

> [t]he power of taxation remains in the States, concurrent and co-extensive with that of congress; with the sole exception of duties on imports and exports, which the States can not impose except by the consent of congress. – 2 Story on Con. § 937. Therefore congress has no more the power to tax judicial process of the State courts, than have the States to tax judicial process of the national courts.

Smith v. Short, 40 Ala. at 389.

Chief Justice Marshall had articulated much the same principle in *M'Culloch v. Maryland*. This is an aspect of what has become known as the doctrine of intergovernmental tax immunity. In *M'Culloch*, the doctrine found its most ample expression in the famous words of Chief Justice Marshall:

> [t]hat the power to tax involves the power to destroy; that the power to destroy may defeat and render useless the power to create; that there is a plain repugnance in conferring on one government a power to control the constitutional measures of another, which other, with respect to those very measures, is declared to be

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[7] Although *Smith v. Short* involved a federal stamp tax on writs issued by Alabama courts, the principle enunciated by the Alabama Supreme Court would seem to be broader.

> supreme over that which exerts the control, are propositions not to be denied.[8]

M'Culloch, 17 U.S. at 431.

The historical basis, and current status, of the constitutional doctrine of intergovernmental tax immunity are set forth in the majority opinion in *Davis v. Michigan Dep't of Treasury*, 489 U.S. at 803, 109 S.Ct. at 1500. The Court stated:

> [a]fter *Graves* [*Graves v. New York ex rel. O'Keefe*, 306 U.S. 466[, 59 S.Ct. 595, 83 L.Ed. 927] (1939), frequently referred to as the *O'Keefe* case], therefore, intergovernmental tax immunity barred only those taxes that were imposed directly on one sovereign by the other or that discriminated against a sovereign or those with whom it dealt.[9]

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[8] Although this well-known statement has been depreciated (by Justices Holmes, Frankfurter and the second Marshall among others – *see Agricultural Bank v. Tax Comm'n*, 392 U.S. 339, 350-51, 88 S.Ct. 2173, 2179-80, 20 L.Ed.2d 1138 (1968), dissent of Marshall, J.), *M'Culloch v. Maryland* continues to be relied upon. *See e.g., Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 109 S.Ct. 1500, 103 L.Ed.2d 891 (1989); *North Dakota v. United States*, 495 U.S. 423, 434, 110 S.Ct. 1986, 109 L.Ed.2d 420 (1990).

[9] *See also McPheeter v. Auburn*, 259 So.2d at 836, where the Alabama Supreme Court, in assessing the effect of *Graves*, quoted from *McConnell v. City of Columbus*, 172 Ohio St. 95, 15 O.O.2d 168, 173 N.E.2d 760 (1961): "[h]owever, since the decision in *Graves v. State of New York*, . . . it no longer can be seriously argued that a nondiscriminatory tax on income earned for services rendered to or work done for a government represents a legally recognizable interference with the activities

Id., 489 U.S. at 811, 109 S.Ct. at 1505. Thus, a fundamental issue before this Court is whether the Jefferson County tax is "imposed directly on" the federal government.

Graves involved the constitutionality of a state *income* tax upon the salary received by an employee of the Home Owner's Loan Corporation (HOLC). *Graves v. New York ex rel. O'Keefe*, 306 U.S. 466, 59 S.Ct. 595, 83 L.Ed. 927 (1939). The income of the Corporation itself had been Congressionally exempted from state taxation. The Court stated that

> the only possible basis for implying a constitutional immunity from state income tax of the salary of an employee of the national government or of a governmental agency is that the economic burden of the tax is in some way passed on so as to impose a burden on the national government tantamount to an interference by one government with the other in the performance of its functions.

Id. at 481, 59 S.Ct. at 599. Concluding that the state income tax was not a constitutionally impermissible burden, the *Graves* Court pointed out:

1. The tax was non-discriminatory;

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of that government so as to constitute a tax upon that government." 173 N.E.2d at 762 (citation omitted).

The state of the law in this area was similarly canvassed in *Western Ry. of Alabama v. State*, 241 Ala. 440, 3 So.2d 9 (1941), to much the same conclusion. *See also* Paul J. Hartman, *Federal Limitations on State and Local Taxation* chapter 6 (1981).

2. It is not in form or substance a tax upon the Home Owners' Loan Corporation or its property or income, nor is it paid by the corporation or the government from their fund;

3. It is measured by income which becomes the property of the taxpayer when received as compensation for his services;

4. And the tax is laid upon the privilege of receiving income, is paid from the taxpayer's private funds, and not from the funds of the government, either directly or indirectly.

Graves, 306 U.S. at 480, 59 S.Ct. at 598.

The Court then held that:

> [t]he theory, which once won a qualified approval, that a tax on income is legally or economically a tax on its source, is no longer tenable, *New York ex rel. Cohn v. Graves*, 300 U.S. 308, 313, 314[, 57 S.Ct. 466, 467, 468, 81 L.Ed. 666]; *Hale v. State Board*, 302 U.S. 95, 108 [58 S.Ct. 102, 107, 82 L.Ed. 72]; *Helvering v. Gerhardt*, [304 U.S. 405, 412-415, 58 S.Ct. 969, 971-973, 82 L.Ed. 1427 (1938)] *supra; cf. Metcalf & Eddy v. Mitchell* 269 U.S. 514[, 46 S.Ct. 172, 70 L.Ed. 384] [*see* particularly pp. 522-26, 46 S.Ct. at pp. 174-175]; *Fox Film Corp. v. Doyal*, 286 U.S. 123[, 128, 52 S.Ct. 546, 547, 76 L.Ed. 1010 (1932)]; *James v. Dravo Contracting Co., supra*, [302 U.S. 134], 149[, 58 S.Ct. 208, 216, 82 L.Ed. 155 (1937)]; *Helvering v. Mountain Producers Corp.*, 303 U.S. 376. . . . [, 58 S.Ct. 623, 82 L.Ed. 907 (1938)]

Id., 306 U.S. at 480-81, 59 S.Ct. at 598-99.

For purposes of this litigation, the Court believes that there are significant differences between the two cases. The respondent in *Graves* was an employee of an agency created by Congress pursuant to the Commerce power. The Court pointed out that Congress had the power to grant immunity from state taxation with respect to the agencies which it can constitutionally create. *Id.* at 478, 59 S.Ct. at 597. The federal judiciary, however, was not created by the Congress, but is co-equal with the Congress itself, and the Executive, by virtue of Articles I, II and III of the Constitution.

The *Graves* Court pointed out that "when the national government lawfully acts through a corporation which it owns and controls, those activities are governmental functions entitled to whatever tax immunity attaches to those functions when carried on by the government itself through its departments." *Id.* at 477, 59 S.Ct. at 597. The nature of the activities conducted determines whether the tax involved is upon the government itself. Here, the tax is on the privilege of performing the federal judicial function itself – one of the three grand (Legislative; Executive; Judicial) federal functions. Although measured by income, the tax here, nevertheless, is imposed upon the function itself, performed by officers of the government. It is not imposed upon the receipt by defendants, as citizens of Alabama, of income indistinguishable from their income received from other sources, as in the case of the employee of the HOLC.

Thus, in *New York ex rel. Cohn v. Graves*, 300 U.S. 308, 57 S.Ct. 466, 81 L.Ed. 666 (1937) (*Ex rel. Cohn*), one of the cases relied upon in *Graves*, 306 U.S. at 466, 59 S.Ct. at 595, the Court had upheld as constitutional a tax by a

state upon income received by its resident from rents on land located without the state and interest on bonds, also physically located without the state and secured by mortgages similarly situated. The Court held such a tax:

> apportioned to the ability of the taxpayer to pay it, is founded upon the protection by the state to the recipient of the income in his person, in his right to receive the income and in his enjoyment of it when received. These are rights and privileges which attach to domicil within the state. To them and to the equitable distribution of the tax burden, the economic advantage realized by the receipt of income and represented by the power to control it, bears a direct relationship.
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> *Ex rel. Cohn*, 300 U.S. at 313, 57 S.Ct. at 467.

Graves, a case involving the income of an employee of a government instrumentality, had been preceded closely in time and in principle by *James v. Dravo Contracting Co.*, 302 U.S. 134, 58 S.Ct. 208, 82 L.Ed. 155 (1937). *Dravo*, which had upheld a tax on a government contractor, is regarded as a seminal case in the field of intergovernmental tax immunity. *See* Paul J. Hartman, *Federal Limitations on State and Local Taxation* § 6.15 at 289-90 (1981). There the Court pointed out:

> [t]he tax is not laid upon the Government, its property or officers.
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> . . . .
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> The tax is not laid upon an instrumentality of the Government.
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> . . . . Respondent is an independent contractor. The tax is non-discriminatory.

> The tax is not laid upon the contract of the Government.

James v. Dravo Contracting Co., 302 U.S. at 149, 58 S.Ct. at 216 (citations omitted).

The tax in the instant case, by contrast, is laid upon officers of the Government in the very performance of their governmental functions. The *Dravo* Court noted that a "tax upon their [federal instrumentalities'] operations is a direct obstruction to the exercise of Federal powers." *Dravo*, 302 U.S. at 155, 58 S.Ct. at 218 (quoting *Railroad Co. v. Peniston*, 85 U.S. (18 Wall.) 5, 37, 21 L.Ed. 787 (1873)).

The *Cohn* Court had made it plain that it was holding constitutional a state *income* tax based upon "the receipt and command of income." *Ex rel. Cohn*, 300 U.S. at 314, 57 S.Ct. at 468. That rationale subsequently became settled law in *O'Malley v. Woodrough*, 307 U.S. 277, 59 S.Ct. 838, 83 L.Ed. 1289 (1939), but is not applicable to the privilege or occupation tax here at issue.

As the *Davis* Court pointed out, 4 U.S.C. § 111 (the Public Salary Act) merely modified the result in *Graves*, observing: "[w]hen Congress codifies a judicially defined concept, it is presumed, absent an express statement to the contrary, that Congress intended to adopt the interpretations placed on that concept by the courts." *Davis v. Michigan Dep't of Treasury*, 489 U.S. at 813, 109 S.Ct. at 1506. Congress did the same with respect to the *Buck* Act by disclaiming any intent to consent to imposition of a state tax directly upon the U.S. "or any instrumentality thereof." 4 U.S.C. § 107.

The *Davis* Court further stated:

> [i]t is true that intergovernmental tax immunity is based on the need to protect each sovereign's governmental operations from undue influence by the others. *Graves*, 306 U.S. at 481[, 59 S.Ct. at 599]; *McCulloch* [*M'Culloch*] *v. Maryland*, 4 Wheat. at 435-436. But it does not follow that private entities or individuals who are subjected to discriminatory taxation on account of their dealings with a sovereign cannot themselves receive the protection of the constitutional doctrine. Indeed, all precedent is to the contrary.[10]

Davis, 489 U.S. at 814, 109 S.Ct. at 1507.

In the case *sub judice*, the Jefferson County occupational tax is imposed directly upon a governmental function – the performance in the federal courthouse in Birmingham, Alabama of federal judicial functions. Those functions are the actual event taxed (the legal incidence of the tax). Thus, in *McPheeter*, the Alabama Supreme Court stated:

> [t]he ordinance imposes the tax or license fee in return for the privilege of engaging in a trade, occupation or profession in the City of Auburn and for being afforded the benefit of the

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[10] If an individual has standing to raise the issue of unconstitutional discrimination, as in *Davis*, such individual has standing to raise any constitutional question with respect to the tax involved as it affects him.

> facilities of the city while in the pursuit of that business.[11]
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> * * *
>
> Imposing payment of the tax or license fee on the individual so engaged and employed places no tax burden on Auburn University, the State or the federal government as such. *The tax is* not *levied* on the employer-employee relationship, but *on the taxable event of rendering services or following a trade, business or profession.* The
>
> > ordinance places the tax on an employee's privilege of working in the city limits of Auburn regardless of the person's employer or the place of residence of the employee.

McPheeter, 259 So.2d at 835-36 (emphasis added) (citation omitted).

The Jefferson County tax, of course, would be paid by individual federal judges, the defendants, out of their own pockets without imposing any monetary (economic) burden upon the Federal Government itself. The economic burden on defendants would be no less if the tax truly were an income tax. But the tax does not purport to, and legally cannot, be based upon the *receipt* by defendants *of income* from the performance of the functions (which would violate Alabama's constitution), but instead is based squarely upon their performance, as

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[11] It is the government of the United States which receives benefit from the facilities of Jefferson County while its judicial business is being pursued, not the federal judges sitting in the courthouse located in Jefferson County.

federal judges, of the judicial function (a federal operation) itself. *See McPheeter*, 259 So.2d at 833.

Neither the Public Salary Act nor the Buck Act could, nor do they purport to, change the actual legal nature, incidence, or the effect, of the tax here involved as established by Alabama's highest court. *McPheeter*, and other Alabama cases on the actual nature and effect of the tax here, are important, and decisive, to the decision of the issues herein. The decisions of the United States Supreme Court on the constitutional issues here involved concern the actual characteristics and effects of the taxes considered, not the labels affixed thereto. If the true, actual incidence of the tax is the *receipt* of income, that is a taxable event within the jurisdiction of the State over its own citizens who receive the income; if, however, the true actual incidence of the tax is the performance of a federal judicial function, that is a taxable event without the jurisdiction of the state. The Alabama decisions establish the latter proposition.

[6] Following the adoption of the XVI Amendment of the United States Constitution, the Government of the United States has jurisdiction over its citizens to tax their receipt of income; the states probably have always had jurisdiction over their citizens to tax their receipt of income, certainly after *Graves*, 306 U.S. at 466, 59 S.Ct. at 595. The proposition that the *receipt* of income *by the citizen of a state* is a taxable event within the taxing powers of the state found early expression in the dissent of Justice Johnson in *Weston v. Charleston*, 27 U.S. (2 Pet.) 449, 470-72, 7 L.Ed. 481 (1829). In that dissent he interpreted *M'Culloch v. Maryland* as banning state and local taxes only when laid directly on the means used by the

government in the exercise of its powers; but being of the opinion that the *Weston* tax was imposed on the *receipt of income* from federal securities (and thus, within his understanding of state taxing jurisdiction), he found no constitutional infirmity in the tax. In *M'Culloch v. Maryland*, Chief Justice Marshall had declared:

> [i]f we measure the power of taxation residing in a state, by the extent of sovereignty which the people of a single state possess, and can confer on its government, we have an intelligible standard, applicable to every case to which the power may be applied. We have a principle which leaves the power of taxing the people and the property of a state unimpaired; which leaves to a state the command of all its resources, and which places beyond its reach, all those powers which are conferred by the people of the United States on the government of the Union. . . .

17 U.S. at 429-30. *See* Paul J. Hartman, *Federal Limitations on State and Local Taxation* § 6:3 at 243. One hundred and seventy-five years later, after many intervening decisions, and the enactment of various statutes, the view that *receipt* of income, by the individual as citizen of the state, is a taxable event separate and apart from his activities in earning income in his capacity as officer or employee of the Federal Government, appears to be good law today, as construed by the United States Supreme Court. *See O'Malley v. Woodrough*, 307 U.S. at 277, 59 S.Ct. at 838.[12]

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[12] Receipt of income may be protected by the anti-diminution clause of Article III, Section 1 of the United States Constitution.

[7] Article III, Section 1 of the United States Constitution provides (in part):

> [t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour

. . . .

In the United States's unique federal system, neither a state nor any of its subdivisions can diminish the power or authority of a judge appointed and serving under Article III. In *Harrison v. St. Louis & San Francisco R.R. Co.*, 232 U.S. 318, 34 S.Ct. 333, 58 L.Ed. 621 (1914), the Supreme Court reasserted:

> [i]t may not be doubted that the judicial power of the United States as created by the Constitution and provided for by Congress pursuant to its constitutional authority, is a power wholly independent of state action and which therefore the several States may not by any exertion of authority in any form, directly or indirectly, destroy, abridge, limit or render inefficacious.

Id. at 328, 34 S.Ct. at 335.

[8] The adjudication of litigation in the federal courts is an exertion of the judicial power of the United States, and is an integral function, and an important operation, of the federal government. The federal judiciary is, without question, a "constituent part" of the federal government. *Cf. United States v. Township of Muskegon*, 355 U.S. 484, 486, 78 S.Ct. 483, 485, 2 L.Ed.2d

436 (1958); *United States v. Boyd*, 378 U.S. 39, 47, 84 S.Ct. 1518, 1523, 12 L.Ed.2d 713 (1964). It is an "arm[ ] of the government deemed by it essential for the performance of governmental functions." *Standard Oil Co. v. Johnson*, 316 U.S. 481, 485, 62 S.Ct. 1168, 1170, 86 L.Ed. 1611 (1942). *See Department of Employment v. United States*, 385 U.S. 355, 358-60, 87 S.Ct. 464, 466-68, 17 L.Ed.2d 414 (1966) (holding Red Cross to be an instrumentality of the U.S. Government). This tax is, and legally must by Alabama law be, laid *directly* on the *performance of that function or operation*. *McPheeter*, 259 So.2d at 835-37. The tax, therefore, is unconstitutional under the contemporary doctrine of intergovernmental tax immunity as set forth in the *Davis* case unless saved by the consent contained in the Public Salary Act and the Buck Act.

The Public Salary Act and the Buck Act are, of course, statutes which have been held to be valid exercises of Congressional power with respect to their subject matter. Their purpose, as expressed in the *Pittsburgh* case, was to waive the "United States' right to constitutional sovereign immunity from state taxation of federal employees' income." *Pittsburgh*, 757 F.2d at 46; *Davis*, 489 U.S. at 812, 109 S.Ct. at 1506. They were part of the resolution of a dispute, pending for well over a century, whether a tax on the *receipt* of *income* or other payment was an indirect tax on the government payor itself and, for that reason protected by intergovernmental tax immunity. *Davis*, 489 U.S. at 812, 109 S.Ct. at 1506. *See generally* Paul J. Hartman, *Federal Limitations on State and Local Taxation*, chapter 6 and Supp.1992. There has never been any substantial question since the decision in *M'Culloch v.*

Maryland that a state franchise tax upon a federal instrumentality is prohibited by the Constitution. The prohibition of such a tax is the very essence of the enduring concept of intergovernmental tax immunity. On that point, *M'Culloch v. Maryland* is as good law today as it was in 1819. *See supra* note 4 at 1539.

Thus, with respect to everything within the reach of Congressional powers, express or implied, the Court must conform to the decisions in *Pittsburgh*, and *Davis*, and hold that, to the extent of its power, Congress has waived the government's immunity from state taxation of the income of its employees. But, just as it is beyond the power of Congress to avoid the anti-diminution provisions of Article III, Sec. 1 of the United States Constitution, *United States v. Will*, 449 U.S. 200, 101 S.Ct. 471, 66 L.Ed.2d 392 (1980), so too, Congress cannot alter or impair the first clause of Article III. Nor can it constitutionally give effective consent to such alteration or impairment by a state. Accordingly, the Court concludes that the tax imposed by Ordinance 1120, by express intention and in real effect, is a franchise tax imposed upon the federal judicial operations and is unconstitutional as a direct tax upon an officer and instrumentality[13] of the United States, that is, upon the sovereign itself.

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[13] Surely a federal judge is as integral a part of the United States as an officers club, *United States v. Tax Comm'n of Mississippi*, 412 U.S. at 363, 93 S.Ct. at 2183; *United States v. Tax Comm'n of Mississippi*, 421 U.S. at 599, 95 S.Ct. at 1872; a post exchange, *Standard Oil Co. v. Johnson*, 316 U.S. at 485, 62 S.Ct. at 1170; or the Red Cross, *Department of Employment v. United States*, 385 U.S. at 355, 87 S.Ct. at 464. "Officers" are the flesh and blood equivalents of "instrumentalities."

2. *Does the tax violate the Anti-Diminution Clause of Article III, Section 1 of the United States Constitution?*

[9] Article III, Section 1 of the Constitution of the United States provides, in part, that:

> [t]he Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Ordinance 1120 of 1987, as applied to defendants, would diminish the compensation of Article III judges, at the very least that of those who had entered office prior to the enactment of that ordinance as had defendants. Defendant Clemon was appointed June 30, 1980; Defendant Acker was appointed August 18, 1982.

Prior to *O'Malley v. Woodrough*, 307 U.S. at 277, 59 S.Ct. at 838, the Supreme Court had consistently held that even a federal net income tax could not, constitutionally, be imposed upon the salaries of federal judges. *Evans v. Gore*, 253 U.S. 245, 257, 40 S.Ct. 550, 554, 64 L.Ed. 887 (1920) (even the XVI Amendment did not so authorize. *See Evans v. Gore*, (*cf.* Holmes J., and Brandeis J., dissenting)). And in *O'Malley v. Woodrough*, adopting substantially the reasoning of the Holmes-Brandeis dissent in *Evans v. Gore*, 253 U.S. at 264-66, 40 S.Ct. at 557-58,[14] the

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[14] "I think that the moment the salary is received, whether kept distinct or not, it becomes part of the general income of the owner. . . . I see no greater reason for exempting the recipients while they still have the income as income than when they have invested it in a house or bond." *Evans v. Gore*, 253 U.S. at 266, 40

Court, overruling *Evans v. Gore*, upheld the federal income tax as constitutional only as to judges of courts of the United States taking office after June 6, 1932. "For it was the Act of June 6, 1932 that gave notice to all judges thereafter to be appointed, of the new congressional policy to include the judicial salaries of such judges in the assessment of [federal] income taxes." *O'Malley v. Woodrough*, 307 U.S. at 279, 59 S.Ct. at 838. Justice Frankfurter, in the majority opinion in *O'Malley*, stated:

> Congress [by the Revenue Act of 1932] has committed itself to the position that *a non-discriminatory tax laid generally on net income is not, when applied to the income of a federal judge, a diminution of his salary within the prohibition of Article III, § 1 of the Constitution.* To suggest that it makes inroads upon the independence of judges who took office after Congress had thus charged them with the common duties of citizenship, by making them bear their aliquot share of the cost of maintaining the Government, is to trivialize the great historic experience on which the framers based the safeguards of Article III, § 1. To subject them to a general tax is merely to recognize that judges are also citizens, and that their particular function in government does not generate an immunity from sharing with their fellow citizens the material burden of the government whose Constitution and laws they are charged with administering.[15]

S.Ct. at 557 (Holmes, J., dissenting). The tax here becomes effective even before the income is earned, and before it is paid, and before it is received.

[15] Justice Frankfurter's analysis, with its emphasis on citizenship, echoes that of Chief Justice Marshall. As applied to

307 U.S. at 282, 59 S.Ct. at 840 (emphasis added). The Court went on to note:

> [a]fter this case came here, Congress, by § 3 of the Public Salary Tax Act of 1939, amended § 22(a) [of the Revenue Act of 1932] so as to make it applicable to "judges of courts of the United States who took office on or before June 6, 1932." That section, however, is not now before us. But to the extent that what the Court now says is inconsistent with what was said in *Miles v. Graham*, 268 U.S. 501, [45 S.Ct. 601, 69 L.Ed. 1067 (1925)], the latter cannot survive.

Id., 253 U.S. at 282-83, 40 S.Ct. at 525. Before the amendment effectuated by § 3 of the Public Salary Tax Act, the Revenue Act of 1932 had provided, in § 209:

> "[i]n the case of the judges of the Supreme Court, and of the inferior courts of the United States created under Article III of the Constitution, who took office on or before June 6, 1932, the compensation received as such shall not be subject to income tax under the Revenue Act of 1938 or any prior revenue Act."

Id. at 282, n. 10, 40 S.Ct. at 525, n. 10.

The explicit holding of the *O'Malley* Court, therefore, was that only judges appointed *after* the Revenue Act of 1932 did not enjoy Article III anti-diminution immunity

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this case, Alabama (Jefferson County) has full authority to tax, without discrimination, those taxable events which are aspects of defendants' Alabama citizenship and over which it has authority, but not those "conferred by the people of the United States on the government of the Union," the exercise of Article III judicial power.

with respect to the levying of the net income tax imposed thereby. But *O'Malley* approved, and set into the constitutional framework, the proposition "that a non-discriminatory tax laid generally on net income[16] is not, when applied to the income of a federal judge, a diminution of his salary within the prohibition of Article III, § 1, of the Constitution." *O'Malley*, 307 U.S. at 282, 59 S.Ct. at 840. To this extent only, as indicated by Justice Frankfurter, the holding in *Miles v. Graham*, 268 U.S. at 509, 45 S.Ct. at 602, that "there is no power to tax a judge of the United States on account of the salary prescribed for him by law," was rejected.[17]

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[16] *Cf.* dissent of Justices Douglas and Black (both voting with the majority in *O'Malley*) in *Howard:*

> "I have not been able to follow the argument that this tax is an 'income tax' within the meaning of the Buck Act. It is by its terms a 'license fee' levied on the privilege 'of engaging in certain activities.'. . . . The exclusions emphasize that the tax is on the *privilege* of working or doing business in Louisville. That is the kind of tax the Kentucky Court of Appeals held it to be. The Congress has not yet granted local authorities the right to tax the privilege of working for or doing business with the United States."

Howard, 344 U.S. at 629, 73 S.Ct. at 468 (citation omitted). *See also Murdock v. Pennsylvania*, 319 U.S. 105, 63 S.Ct. 870, 87 L.Ed. 1292 (1943), where Justice Douglas, writing for the majority, expressed the same idea in a First Amendment context. "It is one thing to impose a tax on the income or property of a preacher. It is quite another thing to exact a tax from him for the privilege of delivering a sermon." *Id.* at 112, 63 S.Ct. at 874.

[17] *See generally* Justice Frankfurter's later views as expressed in his dissenting opinion in *City of Detroit v. Murray Corp.*, 355 U.S. 489, 495-505, 78 S.Ct. 486, 487-92, 2 L.Ed.2d 424 (1958), where he refers to the "residuum" of continuity in the

The legislative definition of "income tax" in 4 U.S.C. § 110(a) is inapposite to the constitutional question before this Court, the answer to which depends upon determining what is the actual legal effect and incidence of the tax. The tax imposed by Ordinance 1120 is *not* an income tax as such is generally understood, nor is it an income tax under Alabama law. *McPheeter*, 259 So.2d at 834-37; *Estes*, 94 So.2d at 746-52. That is so because it is not, in fact, a tax upon the *receipt* of income, pay, or compensation, (the taxable event held in *O'Malley* to be constitutionally permissible), but rather, is a license or privilege tax which finds its taxable event, or incidence, in the *performance* of a federal judicial function. Its incidence, thus, is upon the performance of judicial functions by a judicial officer, antecedent to the point that the salary therefor having been paid by the government becomes the property of the individual citizen of Alabama, mixed with all his other goods and subject to the protection and benefits he receives as a citizen of Alabama.

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intergovernmental tax immunity cases, crediting Chief Justice Marshall with establishing the governing principles, including,

> " '[t]hat the *attempt* to use the power of taxation on the means employed by the government of the Union in pursuance of the Constitution, is itself an abuse, because it is the usurpation of a power which the people of a single State cannot give. . . . *Weston v. City Council of Charleston*, 27 U.S. (2 Pet.) 449, 467, 7 L.Ed. 481 as quoted by Mr. Justice Bradley in *Railroad Co. v. Peniston*, 85 U.S. (18 Wall.) 5, 38-39, 21 L.Ed. 787 (dissenting opinion).' "

City of Detroit, 355 U.S. at 497, 78 S.Ct. at 487 (emphasis added).

[10] Although Congress certainly has full power to grant or waive immunity as to officers or instrumentalities created by it, and perhaps even as to itself, and perhaps even beyond the boundaries which the Supreme Court would set were Congress silent, *North Dakota v. United States*, 495 U.S. 423, 439, 110 S.Ct. 1986, 1996, 109 L.Ed.2d 420 (1990), it has no power to impair or to waive the anti-diminution clause of Article III, Section 1, as to United States judges appointed and serving thereunder. In *United States v. Will*, 449 U.S. at 228-29, 101 S.Ct. at 487-88, the Supreme Court held that Congress had no power to withdraw a judicial salary increase that had already vested. The *Will* Court stated that: "[a] paramount-indeed, an indispensable-ingredient of the concept of powers delegated to coequal branches is that each branch must recognize and respect the limits on its own authority and the boundaries of the authority delegated to the other branches." 449 U.S. at 228, 101 S.Ct. at 487.

The tax here in issue constitutes an unconstitutional diminution of defendants' compensation and is invalid as to them. Both defendants were appointed prior to the enactment of Ordinance No. 1120. The enactment of that ordinance constituted no notice to them that their salaries as federal judges would be diminished by the amount of the tax. Their entitlement to the salary prescribed by Congress for federal district judges had vested prior to the enactment of Ordinance 1120. The Court therefore finds that ordinance unconstitutional as applied to defendants as contrary to Article III, Section 1 of the Constitution of the United States.

The Court should note, however, that were it necessary it would hold that even if the ordinance had been

enacted before the defendants' appointments, the tax imposed thereby would nevertheless constitute an unconstitutional diminution of defendants' salaries contrary to Article III, Section 1. It is not a true income tax, but is imposed directly upon an exclusively federal function; it effectively diminishes the compensation which the judge is entitled to receive, rather than taxing an incident of defendants' state citizenship.

Accordingly, the Court **GRANTS** defendants' motion for summary judgment on the ground that Ordinance 1120 as applied to the defendant judges contravenes Article III of the United States Constitution, as well as the Constitution's Supremacy Clause, Article VI, and **DENIES** plaintiff's motion for summary judgment. In view of the above ruling, and for the reasons set forth above, the Court does not reach the question whether ordinance 1120 is discriminatory with respect to the source of the pay or compensation taxed.

II. ALL OTHER MOTIONS

In view of the above ruling, the Court DENIES all remaining motions as moot.

CONCLUSION

In sum, the Court: 1) **GRANTS** defendants' motion for summary judgment; 2) **DENIES** plaintiff's motion for summary judgment; and 3) **DENIES** all other motions as MOOT.

The Clerk of Court is DIRECTED to enter final judgment in favor of defendants and against plaintiff and to assess costs against plaintiff.

SO ORDERED.

ATTACHMENT A

UNDISPUTED MATERIAL FACTS

1. Alabama Act 406 (1967) authorizes Jefferson County, Alabama, to impose a privilege, license or occupational tax upon all persons engaged in any vocation, occupation, calling or profession who are not required by state law to pay a privilege, license or occupational tax to the state of Alabama.

2. In 1987, the Jefferson County Commission, the governing body of the County, enacted Ordinance 1120, which imposes a privilege, license or occupational tax upon all persons engaged in any vocation, occupation, calling or profession within the County not required by state law to pay a privilege, license or occupational tax to the state.

Section 2 of Jefferson County Ordinance No. 1120 provides:

> [i]t shall be unlawful for any person to engage in or follow any vocation, occupation, calling or profession . . . within the county . . . without paying license fees for the privilege of engaging in or following such vocation, occupation, calling or profession. . . .

Section 1, Definitions, subsection (C), provides:

> [t]he words "vocation, occupation, calling and profession" shall also mean and include the holding of any kind of office or position either by election or appointment, by any federal, state, county or city officer or employee where the services of such official or employee are rendered within Jefferson County, Alabama.

3. The effective date of the ordinance was January 1, 1988. The County Occupational Tax is measured at the rate of one-half of one percent (.005) of the gross receipts earned within the geographic boundary of Jefferson County, Alabama.

4. At all times since January 1, 1988, defendants have been employed by the United States of America as District Judges for the Northern District of Alabama pursuant to Article III of the Constitution of the United States.

5. The Northern District of Alabama is composed of 31 counties, including Jefferson County.

6. Defendants maintain their principal offices at the Hugo Black Federal Courthouse in the City of Birmingham, Jefferson County, Alabama.

7. Defendants routinely perform some but not all of their duties outside of Jefferson County, Alabama.

8. Ordinance No. 1120, section 3, provides:

> [i]n cases where compensation is earned as a result of work done or services performed both within and without the County, the license fees required under this Ordinance shall be computed by determining upon the oath of the

> employer, or if required by the Director of Revenue upon the oath of the employee, that percentage of the compensation earned from the proportion of the work which was done or performed within the County.

Since the effective date, neither the Administrative Office of the United States Courts nor any Article III judge in the Northern District of Alabama, has ever made an oath certifying the alleged amounts of a federal judge's salary earned within and without Jefferson County.

9. Defendants are not required by any state law to pay any privilege, license or occupational tax to the state of Alabama. Defendants, however, still pay their dues (one-half of the dues of a licensed practicing attorney) to the Alabama State Bar, which is an integrated bar, and, as such, is an arm or agency of the State of Alabama. Although defendants are not and cannot be licensed to practice law, they remain sustaining or auxiliary members of the bar as they still pay their dues.

10. The Administrative Office of the United States Courts has never withheld County Occupational Tax from any federal judge or court employee pursuant to the provisions of Ordinance No. 1120.

11. All active judges of the Northern District of Alabama except defendants have paid the County Occupational Tax on differing percentages of their judicial salaries to Jefferson County without supporting those percentages by an oath or by any formal accounting procedure. At least one Article III judge (not a defendant) has paid "under protest."

12. All state District and Circuit Court Judges of the Tenth Judicial Circuit of Alabama have paid the County Occupational Tax. The three Alabama Supreme Court Justices with satellite offices in Jefferson County have paid the County Occupational Tax based on portions of their salaries.

13. The Honorable Robert S. Vance, United States Circuit Judge, who served on the Court of Appeals for the Eleventh Circuit, and who, from January 1, 1988 until his death, had his chambers in Jefferson County, Alabama, where he resided and spent most of his time, never paid the County Occupational Tax.

14. Since 1970, the City of Birmingham, Alabama, has imposed an occupational tax at the rate of one percent of gross receipts (twice the rate of the County tax) on persons engaged in any vocation, occupation, calling or profession within the City.

15. All active judges of the Northern District of Alabama except defendant Acker have paid the City Occupational Tax.

16. Defendant Clemon has paid the City Occupational Tax on approximately 66 percent of his gross earnings during his entire tenure as a United States District Judge.

17. Since 1962, the City of Gadsden, Alabama, where defendant Acker has regularly held court for the last 11 years, has had an occupational tax ordinance similar to the County Occupational Tax, except that it contains no exemptions. The Gadsden ordinance provides in pertinent part:

> [i]t shall be unlawful for any person to engage in or follow any trade, occupation or profession, as defined in this article, within the city on and after the first day of February, 1962, without paying license fees for the privilege of engaging in or following such trade, occupation or profession, which license fees shall be measured by two (2) per cent of the gross receipts of each such person.
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> Gadsden, Alabama Code, Section 7-51.

18. The City of Gadsden has made no effort to exact or to collect a license fee from any of the several Article III judges who, regularly, have sat in the Middle Division of the Northern District of Alabama, which has its courthouse in the City of Gadsden.

19. Defendants have paid their Alabama state income taxes throughout their tenures as federal judges.

20. A final decree entered by defendant Acker as an Article III judge after January 1, 1988, has been formally attacked under Rule 60(b), Fed.R.Civ.P., as having been "unlawfully" entered because said order was entered by defendant Acker when he had not paid his license fee to Jefferson County pursuant to Ordinance No. 1120.